Supreme Court, U.S.
FILED
AUG 02 2007
OFFICE OF THE CLERK

No. 07- 07-138

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

JAMES ODOM *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. SHEPARD
HELLER EHRMAN LLP
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

CARTER G. PHILLIPS*
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

CHARLES B. CASPER
PATRICK T. RYAN
MONTGOMERY, MCCRACKEN,
WALKER & RHOADS, LLP
123 S. Broad Street
Philadelphia, PA 19109
(215) 772-1500

MICHELLE B. GOODMAN
SIDLEY AUSTIN LLP
555 West 5th Street
Los Angeles, CA 90064
(213) 896-6000

Counsel for Petitioner

* Counsel of Record

August 2, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether an association-in-fact "enterprise" under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), must be an organization with an ascertainable structure separate and apart from that inherent in the alleged pattern of racketeering activity.

2. Whether a group of corporations can constitute an association-in-fact RICO enterprise.

STATEMENT REQUIRED BY RULE 14.1

In addition to the parties listed in the caption, the following was a defendant below and is a petitioner in this case:

Best Buy Stores, L.P.;

and the following was a plaintiff below and is a respondent in this case:

Katherine Moureaux-Maloney

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Supreme Court Rule 29.6, petitioner Microsoft Corporation states that there is no parent corporation or publicly held corporation that owns 10% or more of its stock.

Petitioner Best Buy Stores, L.P. (erroneously sued as Best Buy Co., Inc.) states that Best Buy Co., Inc. is the parent company of Best Buy Stores, L.P. As a limited partnership, Best Buy Stores, L.P. does not issue stock, so there is no publicly held corporation that owns 10% or more of its stock. There is also no publicly held corporation that owns 10% or more of Best Buy Co., Inc.'s stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT REQUIRED BY RULE 14.1	ii
STATEMENT REQUIRED BY RULE 29.6	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	11
I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON WHETHER A RICO ENTERPRISE MUST HAVE AN ASCERTAINABLE ORGANIZATIONAL EXISTENCE SEPARATE AND DISTINCT FROM THE ALLEGED PATTERN OF RACKETEERING ACTIVITY	11
II. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE THRESHOLD QUESTION OF WHETHER A GROUP OF CORPORATIONS CAN CONSTITUTE AN ASSOCIATION-IN-FACT ENTERPRISE	18
CONCLUSION	22

TABLE OF AUTHORITIES

CASES Page

Asa-Brandt, Inc. v. *ADM Investor Servs., Inc.*, 344 F.3d 738 (8th Cir. 2003) 8
Atkinson v. *Anadarko Bank & Trust Co.*, 808 F.2d 438 (5th Cir. 1987) 9, 14, 16
Bachman v. *Bear, Stearns & Co.*, 178 F.3d 930 (7th Cir. 1999) 16
Bunker Ramo Corp. v. *United Bus. Forms, Inc.*, 713 F.2d 1272 (7th Cir. 1983) 20
Chang v. *Chen*, 80 F.3d 1293 (9th Cir. 1996) 8
Helvering v. *Morgan's, Inc.*, 293 U.S. 121 (1934) 19
Miranda v. *Ponce Fed. Bank*, 948 F.2d 41 (1st Cir. 1991) 21
Mohawk Indus., Inc. v. *Williams*, 126 S. Ct. 2016 (2006) 19
Reves v. *Ernst & Young*, 507 U.S. 170 (1993) ... 4, 17, 18
Richmond v. *Nationwide Cassel L.P.*, 52 F.3d 640 (7th Cir. 1995) 9
Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985) 2
United States v. *Anderson*, 626 F.2d 1358 (8th Cir. 1980) 14, 15, 16
United States v. *Bagaric*, 706 F.2d 42 (2d Cir. 1983) 14
United States v. *Bledsoe*, 674 F.2d 647 (8th Cir. 1982) 14, 15
United States v. *Blinder*, 10 F.3d 1468 (9th Cir. 1993) 4, 18
United States v. *Cagnina*, 697 F.2d 915 (11th Cir. 1983) 13
United States v. *Feldman*, 853 F.2d 648 (9th Cir. 1988) 20
United States v. *Huber*, 603 F.2d 387 (2d Cir. 1979) 21

TABLE OF AUTHORITIES—continued

Page

United States v. *Johnson*, 440 F.3d 832 (6th Cir.), *cert. denied*, 127 S. Ct. 48 (2006) 9, 14, 16
United States v. *Masters*, 924 F.2d 1362 (7th Cir. 1991) 14, 21
United States v. *Navarro-Ordas*, 770 F.2d 959 (11th Cir. 1985) 20
United States v. *Neapolitan*, 791 F.2d 489 (7th Cir. 1986) 14, 17
United States v. *Patrick*, 248 F.3d 11 (1st Cir. 2001) 13
United States v. *Perholtz*, 842 F.2d 343 (D.C. Cir. 1988) 10, 21
United States v. *Riccobene*, 709 F.2d 214 (3d Cir. 1983) 9, 14, 15, 17
United States v. *Sanders*, 928 F.2d 940 (10th Cir. 1991) 8, 14, 17
United States v. *Thevis*, 665 F.2d 616 (5th Cir. 1980) 20, 21
United States v. *Tillett*, 763 F.2d 628 (4th Cir. 1985) 9, 14, 17
United States v. *Turkette*, 452 U.S. 576 (1981) 3, 4, 9, 12, 13

STATUTES

15 U.S.C. § 1693 6
18 U.S.C. § 1343 6
§ 1961 ..... 1, 4, 11, 19
§§ 1961-1968 3
§ 1962 ..... 1, 2, 11
§ 1964(c) 2
Wash. Rev. Code § 19.86.010 6

RULE

Fed. R. Civ. P. 12(b)(6) 7

TABLE OF AUTHORITIES—continued

LEGISLATIVE HISTORY Page

116 Cong. Rec. 600 (1970) 21

SCHOLARLY AUTHORITY

S. Alito, Jr., *Racketeering Made Simple(r), in The RICO Racket* 1 (G. McDowell ed., 1989)..... 20

OTHER AUTHORITY

Webster's Third International Dictionary of the English Language (1969)..... 19

PETITION FOR A WRIT OF CERTIORARI

Petitioner Microsoft Corporation ("Microsoft") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's opinion granting in part Petitioner's motion to dismiss was unpublished and is reproduced in the appendix ("Pet. App.") at 28a-37a. The Ninth Circuit's order granting rehearing en banc was published at 466 F.3d 747 (9th Cir. 2006) and is reproduced at Pet. App. 40a. The Ninth Circuit's opinion reversing the district court's order was published at 486 F.3d 541 (9th Cir. 2007) and is reproduced at Pet. App. 1a-27a. The Ninth Circuit's order staying the mandate pending the filing of this petition for a writ of certiorari was unpublished and is reproduced in the appendix at Pet. App. 38a.

JURISDICTION

The judgment of the Ninth Circuit was entered on May 4, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1961(4) of Title 18 to the United States Code provides that:

> [As used in this chapter,] "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity . . . .

Section 1962(c) of Title 18 to the United States Code provides that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section 1962(d) of Title 18 to the United States Code provides that:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Section 1964(c) of Title 18 to the United States Code provides that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

STATEMENT OF THE CASE

In *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), this Court observed that one of the reasons civil RICO evolved into "something quite different from the original conception of its enactors" was the failure of "the courts to develop a meaningful concept of 'pattern.'" *Id.* at 500. The present

petition arises because it is now clear—some twenty-six years after this Court's decision in *United States* v. *Turkette*, 452 U.S. 576 (1981)—that the lower courts have not developed a consistent and meaningful concept of another critical limitation in the RICO statute: the "enterprise" requirement.

This petition arises from a suit by a putative class of customers of Best Buy Stores, L.P. ("Best Buy") who allege that Microsoft and Best Buy entered into a joint marketing agreement under which trial memberships to Microsoft's MSN Internet Access service ("MSN service") were activated in their names without their knowledge when they purchased certain products from Best Buy. Plaintiffs alleged that this agreement and the actions of Microsoft and Best Buy in furtherance of this agreement constituted an association-in-fact "enterprise" under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"). The Ninth Circuit's decision, which permits this theory of liability to proceed, concededly conflicts with those of other circuits and presents two significant questions concerning the proper interpretation of a statute that is of particular importance to the business community.

The first question is whether an association-in-fact RICO enterprise must have an ascertainable structure separate and apart from what would be inherent in the alleged pattern of racketeering activity. The Ninth Circuit answered this question in the negative, concluding that an association-in-fact "enterprise" need be no more than the sum of the alleged predicate racketeering acts, thereby exacerbating a sharp split in the courts of appeals (now four to seven) on this issue. The Ninth Circuit candidly acknowledged that its holding conflicted with the decisions of the Third, Fourth, Eighth, and Tenth Circuits. Pet. App. 14a-15a. Indeed, the Ninth Circuit's decision also conflicts with the holdings of the Fifth, Sixth, and Seventh Circuits, while it is in accord with decisions of the First, Second, and Eleventh Circuits.

The Ninth Circuit's ruling effectively reads the "enterprise" element out of the statute and thereby impermissibly relaxes the limitations Congress placed on the imposition of RICO's harsh penalties. Section 1962(c)'s requirement that a defendant participate in the operation or management of an "enterprise" is a "critical limitation" on RICO that prevents it from becoming a routine vehicle for imposing civil liability; otherwise, it would be nothing more than a conspiracy or aiding and abetting statute. *Reves* v. *Ernst & Young*, 507 U.S. 170, 183 (1993). The concept of "enterprise" is central to RICO, which was enacted to eradicate *organized* crime. *Turkette*, 452 U.S. at 589. Yet the Ninth Circuit held that where an association-in-fact enterprise is alleged, no organization is required beyond that inherent in the commission of the predicate acts. Under this reading of the statute, the "enterprise" requirement is no limitation at all, at least where two corporate entities are engaged in any joint activities.

The second question meriting this Court's review is whether a group of corporations can constitute an association-in-fact RICO enterprise. Although Petitioner did not expressly raise this precise issue below (as it was previously decided by the Ninth Circuit, see *United States* v. *Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993)), Petitioner has contended throughout this litigation that the enterprise alleged is legally deficient.

The flawed view that an associated-in-fact enterprise can be made up of a group of corporations is contrary to the plain language of the statute, which defines an association-in-fact enterprise as a "group *of individuals* associated in fact." 18 U.S.C. § 1961(4) (emphasis added). Yet this erroneous interpretation is widely adopted by the lower courts and results in numerous civil suits—most of which result in settlements—predicated on a theory unsupported by the statute. There is no conflict among the lower courts on this issue, but the question is one of fundamental importance

because it frames the first question presented in this petition and it exposes virtually every business entity to potential exposure to RICO's treble damages for every joint activity with another business.

The Ninth Circuit's decision permits plaintiffs to proceed with RICO suits against corporations based on their ordinary contractual or other business relationships. If left intact, the appellate court's construction of the RICO enterprise requirement will transform vast amounts of legitimate commercial activity into conduct actionable under RICO. Expanding RICO's scope in this manner will impose significant and unintended costs on American businesses and will convert a statute designed to eradicate organized crime into a tool to induce settlements from legitimate businesses that cannot risk the possibility of an award of treble damages or the reputational injury of being subjected to suit in federal court under a statute associated with racketeers and mobsters. The Court should grant certiorari to help restore civil RICO to its proper role: that of a narrowly drawn remedy aimed at providing redress to the direct victims of organized criminal activity—not a mechanism for the extraction of windfall recoveries arising from perfectly ordinary business transactions.

1. On May 15, 2003, respondent James Odom filed a complaint in the United States District Court for the Northern District of California against Microsoft and Best Buy on behalf of a purported class of all persons "in whose names [a trial subscription to Microsoft's MSN service was] established and activated by the scanning of a Trial CD at a Best Buy store, during the period from May 15, 1999 to the present." Compl. ¶ 19. Plaintiff asserted two federal RICO claims under 18 U.S.C. § 1962(c) and (d) stemming from a joint marketing agreement between Microsoft and Best Buy under which each agreed to promote the other's products and

services.[1] Plaintiff alleged that the agreement and the actions of Microsoft and Best Buy in furtherance of the agreement constituted an "enterprise" and that the defendants conducted the affairs of this claimed "enterprise" though a pattern of racketeering activity.

2. Microsoft moved to dismiss the original complaint in the Northern District of California, arguing *inter alia* that Plaintiff failed adequately to plead a RICO enterprise. Best Buy joined in that motion. At the same time, Microsoft filed (and Best Buy joined) a separate motion to transfer the case to the Western District of Washington. The transfer motion was granted on October 1, 2003.

3. On November 19, 2003, Plaintiffs filed a First Amended Complaint ("Amended Complaint") in the Western District of Washington. Am. Compl. Plaintiffs asserted federal RICO claims under 18 U.S.C. § 1962(c) and (d), a claim under the Electronic Fund Transfer Act (15 U.S.C. § 1693), a claim under the Washington Consumer Protection Act (Wash. Rev. Code § 19.86.010), and a claim for unjust enrichment.

Plaintiffs' allegations almost exclusively focused on the actions alleged to constitute the claimed pattern of racketeering activity. Plaintiffs asserted that "[u]nder an agreement signed in April 2000, Microsoft invested $200 million in Best Buy and agreed to promote Best Buy's online store through its MSN service" and that, in exchange, "Best Buy agreed to promote MSN service and other Microsoft products in its stores and advertising." Am. Compl. ¶ 10. Specifically, Plaintiffs alleged that Best Buy would distribute to its retail customers a Trial CD that provided the customer a trial subscription to MSN service for 30 days or six months, depending on the merchandise purchased. *Id.* ¶ 11. Plaintiffs further alleged that a trial MSN service account was established in the customer's name without his or her

---

[1] The complaint set forth one alleged RICO predicate act—wire fraud (18 U.S.C. § 1343).

knowledge when a Best Buy employee scanned a Trial CD at the checkout counter. *Id.* ¶¶ 12-13. At the end of the trial subscription period, Plaintiffs claimed, Microsoft would begin to charge the customer for the MSN service that the customer allegedly did not know was established. *Id.* ¶ 17.[2]

In an attempt to satisfy § 1962(c)'s requirement that the defendants conduct the affairs of an "enterprise," Plaintiffs asserted that the joint marketing agreement between Microsoft and Best Buy, "together with Defendants' activities in furtherance of the agreement, constitute an 'enterprise.'" Am. Compl. ¶ 34. In addition, Plaintiffs alleged that:

> [t]he material decisions guiding the operation of this enterprise—including but not limited to decisions concerning the form and content of campaigns, advertising, and other vehicles used by either Defendant to promote the other's products and services pursuant to their agreement (and including the design and implementation of the mechanisms through which MSN accounts are established by the swiping of a Best Buy customer's credit or debit card and the scanning of a Trial CD)—are made by Defendants jointly.

Id. ¶ 35. Plaintiffs further claimed that "Best Buy receives a flat payment" as well as "a portion of each monthly MSN charge paid by the customer" from Microsoft. *Id.* ¶ 38.

4. Microsoft and Best Buy filed separate motions to dismiss the Amended Complaint in the Western District of Washington arguing *inter alia* that Plaintiffs' RICO claims should be dismissed because their allegations failed to plead the existence of a cognizable enterprise. On March 16, 2004, the district court dismissed with prejudice Plaintiffs' RICO claims, holding that they did not allege the existence of an

---

[2] While the allegations in the Amended Complaint must be taken as true at this stage, Fed. R. Civ. P. 12(b)(6), Microsoft denies any illegal conduct.

enterprise separate and distinct from the alleged racketeering activity. Pet. App. 34a Thereafter, Plaintiffs voluntarily dismissed their remaining non-RICO claims. On May 18, 2004, the district court entered final judgment for the defendants on the RICO claims.

5. A divided Ninth Circuit, sitting *en banc*, reversed the district court's judgment. Pet. App. 21a. Although a panel of the Ninth Circuit previously held that an association-in-fact enterprise must have an ascertainable organizational existence separate and distinct from that inherent in the alleged pattern of racketeering activity, see *Chang* v. *Chen*, 80 F.3d 1293 (9th Cir. 1996), the majority opinion rejected any such requirement, holding that RICO plaintiffs need not allege that the claimed enterprise had any organizational structure beyond that necessary to commit the alleged acts of racketeering. Pet. App. 17a. Because in this case Plaintiffs alleged that Microsoft and Best Buy "had a common purpose of increasing the number of people using Microsoft's Internet Service," "formed a vehicle for the commission of at least two predicate acts of fraud," and operated under the joint marketing agreement for two years, the Ninth Circuit concluded that Plaintiffs adequately pled an association-in-fact RICO enterprise. *Id.* at 19a-20a.

The majority expressly acknowledged the deeply divided and mature split among the circuits and that its holding conflicted with the decisions of at least four other circuits. Pet. App. 14a-15a (citing decisions from the Third, Fourth, Eighth, and Tenth Circuits). Although the precise formulations vary, each of these circuits interpreted Section 1962(c) and this Court's decision in *United States* v. *Turkette* to require an association-in-fact enterprise to have an ascertainable organizational existence separate and distinct from the alleged pattern of racketeering activity. See *Asa-Brandt, Inc.* v. *ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (8th Cir. 2003) ("enterprise must have ... an ascertainable structure distinct from the pattern of racketeering"); *United*

States v. *Sanders*, 928 F.2d 940, 944 (10th Cir. 1991) ("enterprise" must have "an ascertainable structure that exist[s] apart from the commission of racketeering acts"); *United States* v. *Tillett*, 763 F.2d 628, 632 (4th Cir. 1985) (to allege an "enterprise," a plaintiff must "show that the organization had an existence beyond that which was necessary to commit the predicate crimes" (citations omitted)); *United States* v. *Riccobene*, 709 F.2d 214, 223-24 (3d Cir. 1983) ("enterprise" must have "an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses").

The majority disagreed with these circuits' reading of *Turkette*, holding that this Court's statement that an "enterprise" is "an entity separate and apart from the pattern of activity in which it engages," *Turkette*, 452 U.S. at 583, "is merely a statement of the obvious: The enterprise and its activity are two separate things. One is the enterprise. The other is its activity." Pet. App. 17a. The majority also concluded that a requirement that an enterprise have an ascertainable structure distinct from that necessary to commit the alleged racketeering acts "would necessitate that the enterprise have a structure to serve both illegal racketeering activities as well as legitimate activities." *Id.* at 18a. Accordingly, the Ninth Circuit joined what it considered to be the four circuits that have rejected such a requirement. *Id.* at 17a (citing decisions from the First, Second, Eleventh, and District of Columbia Circuits).[3]

---

[3] The majority opinion concluded that there was an even split among the circuits. But the majority did not properly recognize that the Fifth, Sixth, and Seventh Circuits have each held that an enterprise must have an ascertainable separate structure. *Atkinson* v. *Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5th Cir. 1987) ("Plaintiffs wholly failed to establish the existence of any entity separate and apart from the bank."); *Richmond* v. *Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995) ("There must be 'a structure and goals separate from the predicate acts themselves.'") (quoting *United States* v. *Korando*, 29 F.3d 1114, 1117 (7th Cir. 1994)); *United States* v. *Johnson*, 440 F.3d 832, 840 (6th Cir.) ("'The hallmark of

Seven of the fifteen judges, although concurring in the ultimate result because they believed Respondents should be permitted to attempt to replead the existence of a separate enterprise, disagreed that Plaintiffs' allegations in the existing Amended Complaint gave rise to liability under RICO. Noting that "Odom's complaint narrowly defines the 'enterprise' as only the marketing agreement between Best Buy and Microsoft together and their activities in furtherance of that agreement," five judges rejected the proposition that "if two parties perform a series of 'predicate acts' for each other's benefit pursuant to a commercial agreement, they *ipso facto* constitute an 'enterprise.'" Pet. App. 25a (Silverman, J., concurring in the result). Rather, citing the purpose of RICO—the eradication of *organized* crime—these judges argued that, to constitute a RICO enterprise, a group of persons associated in fact must have at least "some minimal structure, coordination, or ordering principle to distinguish them from a run-of-the-mill conspiracy." *Id.* Two other judges stated that "[i]t strikes [us] as outlandish that what Judge Silverman correctly describes as a 'marketing contract' between Microsoft and Best Buy could subject them to a private RICO action." *Id.* at 27a (Bybee, J., concurring in the result).

The Ninth Circuit stayed its mandate pending the filing of this petition for a writ of certiorari. Pet. App. 38a.[4]

---

an enterprise is structure .... [T]here must be some structure, to distinguish an enterprise from a mere conspiracy ....'") (quoting *United States* v. *Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996)), *cert. denied*, 127 S. Ct. 48 (2006). Also erroneous is the majority's inclusion of the D.C. Circuit among the list of circuits that reject the requirement of a separate and ascertainable structure. The case cited, *United States* v. *Perholtz*, 842 F.2d 343, 363 (D.C. Cir. 1988), did not address this issue, instead concerning itself with the different question of whether an enterprise must be proven with *separate evidence* from the evidence of the predicate acts.

[4] The Ninth Circuit denied Plaintiffs' motion for reconsideration of the order staying the mandate on June 28, 2007. Pet. App. 39a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON WHETHER A RICO ENTERPRISE MUST HAVE AN ASCERTAINABLE ORGANIZATIONAL EXISTENCE SEPARATE AND DISTINCT FROM THE ALLEGED PATTERN OF RACKETEERING ACTIVITY.

This case presents the question whether an association-in-fact RICO "enterprise" must have an ascertainable, and ongoing, organizational structure separate and apart from what would be inherent in the alleged pattern of racketeering. See 18 U.S.C. § 1962(c). The Ninth Circuit's conclusion that it need not is consistent with rulings of the First, Second, and Eleventh Circuits. These decisions, however, directly conflict with the conclusions of the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits. Indeed, the Ninth Circuit itself acknowledged a deep and irreconcilable split among the circuits and that its holding conflicted with the decisions of at least four other circuits. Pet. App. 14a-15a. That is reason enough for this Court to grant certiorari.

Section 1962(c) makes it "unlawful for any person employed by or associated with any *enterprise* . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c) (emphasis added). RICO also makes it unlawful for any person to conspire to violate any provision of this subsection. *Id.* § 1962(d). The statute defines the term "enterprise" as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4).

This Court previously considered the definition of an association-in-fact enterprise. In *United States* v. *Turkette*, the defendants were accused of conducting the affairs of a RICO enterprise described as a group of individuals

associated in fact for the purpose of engaging in a pattern of racketeering activity involving illegal drug trafficking, arson, and other crimes. See 452 U.S. 576, 579 (1981). The First Circuit held that the definition of "enterprise" was limited to legitimate enterprises and did not encompass an association that performed only illegal acts and that had not infiltrated a legitimate enterprise. See *id.* at 579-80. Reading the statute to apply only to legitimate enterprises was necessary, the First Circuit reasoned, to avoid an interpretation of the statute under which a "pattern of racketeering" can, without more, be an "enterprise." See *id.* at 582.

This Court reversed, holding that the term "enterprise" includes both legitimate and illegitimate enterprises. See *id.* at 587. Rejecting the First Circuit's premise that reading the statute to encompass wholly criminal enterprises would necessarily "mean that a 'pattern of racketeering activity' is an 'enterprise,'" this Court stressed that whether legitimate or criminal, "[t]he existence of an enterprise at all times remains a separate element" from the existence of a pattern of racketeering activity. *Id.* at 583.

The Court described the attributes of an associated-in-fact enterprise, and distinguished it from a "pattern of racketeering activity," as follows:

> The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C. § 1961(1) (1976 ed., Supp. III). The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise.

Id.

Although recognizing that the evidence "used to establish these separate elements may in particular cases coalesce," this Court held that "proof of one does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." *Id.*

After *Turkette*, the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits held that a RICO enterprise must have an ascertainable structure and organization separate and distinct from the alleged acts of racketeering because, absent such a requirement, the "enterprise" element of the offense would be interchangeable with the "pattern of racketeering" element and could be satisfied merely by alleging the existence of a conspiracy among the defendants. The Ninth Circuit in the decision below and the First, Second, and Eleventh Circuits disagreed. In those circuits, any loose affiliation of defendants (including a simple conspiracy) is enough to constitute a RICO enterprise.

The Ninth's Circuit's view that a separate ascertainable structure requirement "would necessitate that the enterprise have a structure to serve both illegal racketeering activities as well as legitimate activities," Pet. App. 18a, echoes that of the First Circuit, which rejected such a requirement because "Congress intended the term 'enterprise' to include both legal and criminal enterprises, and because the latter may not observe the niceties of legitimate organizational structures." *United States* v. *Patrick*, 248 F.3d 11, 19 (1st Cir. 2001) (citations omitted). The Eleventh Circuit also rejected any such requirement, holding that a RICO enterprise may be made up of "any group of individuals 'whose association, however loose or informal, furnishes a vehicle for the commission of two or more predicate crimes.'" *United States* v. *Cagnina*, 697 F.2d 915, 921 (11th Cir. 1983). Similarly, the Second Circuit "upheld application of RICO to situations where the enterprise was, in effect, no more than the sum of

the predicate racketeering acts." *United States* v. *Bagaric*, 706 F.2d 42, 56 (2d Cir. 1983).

The Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits disagree with this view, holding that an enterprise must be an organization with an ascertainable structure that is separate and apart from that inherent in the pattern of racketeering activity. See *United States* v. *Johnson*, 440 F.3d 832, 840 (6th Cir.), *cert. denied*, 127 S. Ct. 48 (2006); *United States* v. *Sanders*, 928 F.2d 940, 944 (10th Cir. 1991); *United States* v. *Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991); *Atkinson* v. *Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5th Cir. 1987); *United States* v. *Tillett*, 763 F.2d 628, 632 (4th Cir. 1985); *United States* v. *Riccobene*, 709 F.2d 214, 223-24 (3d Cir. 1983); *United States* v. *Bledsoe*, 674 F.2d 647, 663 (8th Cir. 1982).

These Circuits base their conclusions on two related rationales. First, the broad interpretation espoused by the First, Second, Eleventh, and now Ninth Circuits would effectively render the "enterprise" element of the statute superfluous. "If the 'enterprise' is just a name for the crimes the defendants committed, or for their agreement to commit these crimes ..., two statutory elements—enterprise and pattern—would be collapsed into one." *Masters*, 924 F.2d at 1367 (citations omitted); see *Bledsoe*, 674 F.2d at 664. Such a result, these courts held, would be incongruous given the "central role of the concept of enterprise under RICO." *United States* v. *Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986); see *Riccobene*, 709 F.2d at 221; *United States* v. *Anderson*, 626 F.2d 1358, 1368 (8th Cir. 1980).

Second, this broad definition would equate the term "enterprise" with conspiracy, a result not intended by Congress. "A comparison of the severe penalties authorized by RICO with those for conspiracy indicates that the Act must have been directed at participation in enterprises consisting of more than simple conspiracies to perpetrate the predicate acts of racketeering." *Bledsoe*, 674 F.2d at 664 (comparing 18

U.S.C. § 1963(a) with 18 U.S.C. § 371). This interpretation is also untenable because it would render § 1962(d), which makes it unlawful to conspire to violate § 1962(c), a prohibition on conspiracies to conspire. *Anderson*, 626 F.2d at 1368; see *Riccobene*, 709 F.2d at 221.

Indeed, the language and structure of the RICO statute suggest that, despite the apparent breadth of the definition in 18 U.S.C. § 1961(4), an "enterprise" must be more than a joint or coordinated undertaking by two or more persons. As the Eighth Circuit reasoned in *United States* v. *Bledsoe*:

> The crime defined in 18 U.S.C. § 1962(c) involves two modes of association with an enterprise. In order to violate the provision, an individual must be "employed by or associated with" an enterprise and must "participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." Construing the statute to give effect to all its words, it requires an association with an enterprise which is distinct from participating in the conduct of the enterprise through a pattern of racketeering activity. In order for such association, for example, formal membership in or employment by a legitimate organization or their equivalent in a criminal group, to exist, the enterprise must be more than an informal group created to perpetrate the acts of racketeering.

674 F.2d at 663 (footnote omitted). It is significant that the statute says "associated with" an enterprise. It does not say "associated in an enterprise." The enterprise must therefore be something more than, and distinct from, the persons who comprise it and the acts they allegedly commit.

Thus, the Eighth Circuit held that an alleged association-in-fact enterprise consisting of two county administrators and a salesman who allegedly conspired to submit and approve payment of bogus invoices for merchandise never received by the county does not satisfy the "enterprise" requirement.

Anderson, 626 F.2d at 1362. Noting that "[a] contrary interpretation would alter the essential elements of the offense as determined by Congress" by conflating the "enterprise" and "pattern of racketeering" elements, *id.* at 1365, the Eighth Circuit held that the term "enterprise" encompasses "'only an association having an ascertainable structure ... that has an existence that can be defined apart from the commission of the predicate acts constituting the pattern of racketeering activity.'" *Id.* at 1372.

The Fifth Circuit similarly rejected an alleged association-in-fact enterprise made up of a bank, its holding company, and three employees who purportedly conspired to charge excessive interest rates. See *Atkinson*, 808 F.2d at 440-41. Holding that an enterprise must be an entity separate and apart from the pattern of activity in which it engages, the Fifth Circuit rejected the plaintiffs' claim that this purported enterprise had an ascertainable separate structure because "there was no evidence that the bank, its holding company, and the three employees were associated in any manner apart from the activities of the bank." *Id.*

The Seventh Circuit likewise rejected allegations of an associated-in-fact enterprise that, although sufficient to demonstrate a conspiracy, contained nothing to show that those associating together comprised or created an ascertainable organization. See *Bachman* v. *Bear, Stearns & Co.*, 178 F.3d 930, 931-32 (7th Cir. 1999) (holding that an alleged association-in-fact of the plaintiff's former employer, its parent company, a corporate majority shareholder, two officers and an investment company, all of whom supposedly acted in concert to defraud the plaintiff over a period of several years, might be enough to state a conspiracy, but was insufficient for a RICO enterprise because there was nothing to show that these associates were an organization). See also *Johnson*, 440 F.3d at 840 ("'The hallmark of an enterprise is structure .... [T]here must be some structure, to distinguish an enterprise from a mere conspiracy ....'") (quoting *United*

States v. *Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996)); *Neapolitan*, 791 F.2d at 550 ("While the hallmark of conspiracy is agreement, the central element of an enterprise is structure. An enterprise must be more than a group of people who get together to commit a 'pattern of racketeering activity.'").

The Third, Fourth, Sixth, and Tenth Circuits also endorsed the distinct organizational existence requirement. See *Riccobene*, 709 F.2d at 221-24 (to avoid the danger that "federal prosecutors could use the law to invoke an additional penalty whenever they had a case involving the commission of two offenses that, coincidentally, were among those listed as 'racketeering activities,'" the term "enterprise" must have "an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses"); *Tillett*, 763 F.2d at 632 (to allege an "enterprise," a plaintiff must "show that the organization had an existence beyond that which was necessary to commit the predicate crimes" (citations omitted)); *Sanders*, 928 F.2d at 944 ("enterprise" must have "an ascertainable structure that exist[s] apart from the commission of racketeering acts").

The stark conflict between the decisions of the First, Second, Ninth, and Eleventh Circuits and those of the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits on whether an association-in-fact RICO enterprise must have an ascertainable structure and organization separate and apart from that inherent in the pattern of racketeering activity is an issue of national importance that warrants this Court's review. The broad definition of "enterprise" adopted by the First, Second, Ninth, and Eleventh Circuits would create a drastic and unwarranted expansion of RICO civil liability into an area far afield from the initial purpose of the statute. While it is true that RICO is applied in circumstances different from its initial purpose "to attack the 'infiltration of organized crime and racketeering into legitimate organizations,'" *Reves* v. *Ernst & Young*, 507 U.S. 170, 185 (1993) (quoting S. Rep.

No. 91-617, at 76 (1969)), RICO is clearly not designed as a general civil liability remedy to be used to obtain treble damages against corporations engaged in ordinary contractual business activities. To the contrary, the requirements of § 1962(c), including the enterprise requirement, are "critical limitation[s]" on the applicability of RICO. *Id.* at 183.

Because it allows plaintiffs to plead an association-in-fact enterprise in any case in which there is coordinated activity among businesses, this expansive definition of "enterprise" all but eliminates the enterprise requirement from the statute. Under this standard, any company that engages in a co-marketing arrangement, enters into a distribution agreement, or has any contractual relationship with another company could be alleged to have participated in an "enterprise" designed to engage in the marketing, distribution, or other contractual activity. The rule, in effect, would make a broad range of routine corporate conduct actionable under RICO.[5] This dramatic increase in potential corporate RICO liability with its draconian remedies warrants review.

II. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE THRESHOLD QUESTION OF WHETHER A GROUP OF CORPORATIONS CAN CONSTITUTE AN ASSOCIATION-IN-FACT ENTERPRISE.

The Court should also grant review to consider an antecedent misinterpretation of RICO's enterprise definition that has gained wide acceptance among lower courts: the flawed view that a group of corporations can constitute an association-in-fact enterprise. Although previously adopted by the Ninth Circuit, see *United States* v. *Blinder*, 10 F.3d

---

[5] Moreover, the disagreement among federal appellate courts on this question presents a significant risk of forum shopping. Corporations targeted by civil RICO actions often do business in several states, and this circuit split means that the same corporation would be subject to different liability in different states.

1468, 1473 (9th Cir. 1993), and thus not explicitly contested below, this view is clearly wrong. RICO's definition provides that "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of *individuals* associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). It is plain—both from ordinary meaning and the structure of the statute itself—that the "group of *individuals* associated in fact" refers only to groups of natural persons, not groups of corporations. See *Webster's Third International Dictionary of the English Language* 1152 (1969) (defining "individual" as "a single human being as contrasted with a social group or institution"); 18 U.S.C. § 1961(4) (listing at outset of definition "individual" separately from other entities, including "corporation").

The Court considered this question two terms ago but chose not to resolve it, apparently because it was not raised explicitly in the petition for certiorari. See *Mohawk Indus., Inc.* v. *Williams*, 126 S. Ct. 2016 (2006).[6] In that case, the focus was on whether the definition of "enterprise"—in light of its introduction by the term "includes"—was comprehensive or instead merely provided a list of examples that could be judicially expanded upon. As this Court recognizes, "the term 'includes' may sometimes be taken as synonymous with 'means,'" and thus as introducing a comprehensive list. *Helvering* v. *Morgan's, Inc.*, 293 U.S.

---

[6] At oral argument in *Mohawk*, Chief Justice Roberts commented that "it does seem kind of strange to encompass [corporations] under the term individuals when the same statute uses individuals and corporations separately." Tr. Oral Arg. at 29, *Mohawk Indus., Inc.* v. *Williams*, 126 S. Ct. 2016 (2006) (No. 05-465). *See also id.* at 32 (Kennedy, J.) ("A person is defined—in sub (3) just above it. A person includes any individual or entity. Then the next thing [§ 1961(4)] says [is] individual. So it's not a—it doesn't sound like a corporation."); *id.* at 51 (Souter, J.) (noting the "peculiarity of the definition" of enterprise, which lists "A, B, C, and D, and then it repeats one, but only one, of the items on the list and says groups of these items, i.e., individuals, are included").

121, 125 (1934). The structure of RICO provides powerful evidence that Congress used "includes" to introduce comprehensive definitions.[7]

A reading of § 1961(4) to mean what it says accords with the "two aims" of RICO: "to make it unlawful for *individuals* to function as members of organized criminal groups" and "to stop organized crime's infiltration of legitimate businesses." S. Alito, Jr., *Racketeering Made Simple(r), in The RICO Racket* 1, 3-4 (G. McDowell ed., 1989) (emphasis added). Expanding the meaning of "group of individuals" to encompass corporations takes RICO well beyond these purposes. Such an expansion threatens to "RICO-ize, with its treble damages and private plaintiffs and everything, vast amounts of ordinary commercial activity." Tr. Oral Arg. at 44-45, *Mohawk*, 126 S. Ct. 2016 (2006) (No. 05-465) (Breyer, J.).

The circuit courts' rationales for "RICO-izing" groups of corporations are unpersuasive. For instance, the Eleventh Circuit baldly held that "a group of corporations can be a 'group of individuals associated in fact.'" *United States* v. *Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985). See also *United States* v. *Feldman*, 853 F.2d 648, 655-56 (9th Cir. 1988). Others grafted language onto § 1961(4) that is plainly not there. See *Bunker Ramo Corp.* v. *United Bus. Forms, Inc.*, 713 F.2d 1272, 1285 (7th Cir. 1983) (adding to end of enterprise definition "and any combination of them"); *United States* v. *Thevis*, 665 F.2d 616, 625 (5th Cir. 1980) (approving of "enterprise" consisting of "'a group of individuals

---

[7] Justice Alito commented on this point at oral argument in *Mohawk*, asking:

> Why shouldn't includes here be read to mean means when that seems to be the way it's used in other subsections of this provision and when the only thing that seems to be ... omitted from the list is what's involved here, which is a group consisting of a corporation or ... other legal entity ... and natural persons.

Tr. Oral Arg. at 4, *Mohawk*, 126 S. Ct. 2016 (No. 05-465).

associated in fact with various corporations'"). Other courts simply relied on the term "includes"—without any analysis of whether "includes" was used elsewhere in RICO to introduce comprehensive definitions. See, *e.g.*, *Masters*, 924 F.2d at 1366; *Thevis*, 665 F.2d at 625; *United States* v. *Perholtz*, 842 F.2d 343, 354 (D.C. Cir. 1988); *United States* v. *Huber*, 603 F.2d 387, 394 (2d Cir. 1979).

The courts of appeals may be unanimous on this point, but they are unanimously wrong and their reasoning, which has been quite sparse, does not withstand scrutiny.[8] As a result, numerous civil suits are predicated upon a theory that lacks support in the statute.

Nothing in its text, legislative history, or purpose indicates that RICO was intended to apply to groups of corporations. Indeed, RICO was intended to *protect* businesses from organized crime, not to impose onerous burdens on them. See 116 Cong. Rec. 600, 602 (1970) (remarks of Sen. Hruska) (RICO was "designed to remove the influence of organized crime from legitimate businesses by attacking its property interests and by removing its members from control of legitimate business[]"). Yet because of the potential for plaintiffs to extract windfall recoveries, the statute increasingly is used against legitimate businesses.

A civil action under RICO is "an unusually potent weapon—the litigation equivalent of a thermonuclear device." *Miranda* v. *Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). The Ninth Circuit's holding in this case serves only to further arm those who would attempt to extract settlements from legitimate businesses that cannot risk the possibility of being labeled as racketeers or subjected to an award of treble damages. RICO was never intended to be—and is not—a general criminal conspiracy statute or basis for

---

[8] At oral argument in *Mohawk*, the United States acknowledged that "the analysis doesn't tend to be lengthy." *See* Tr. Oral Arg. at 50-51, *Mohawk*, 126 S. Ct. 2016 (2006) (No. 05-465).

invoking federal jurisdiction over alleged consumer protection claims. This Court should grant certiorari to correct this misinterpretation of RICO and restore association-in-fact enterprises to the scope Congress intended.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL J. SHEPARD
HELLER EHRMAN LLP
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

CARTER G. PHILLIPS*
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

CHARLES B. CASPER
PATRICK T. RYAN
MONTGOMERY, MCCRACKEN,
WALKER & RHOADS, LLP
123 S. Broad Street
Philadelphia, PA 19109
(215) 772-1500

MICHELLE B. GOODMAN
SIDLEY AUSTIN LLP
555 West 5th Street
Los Angeles, CA 90064
(213) 896-6000

Counsel for Petitioner

August 2, 2007

* Counsel of Record

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

[Filed MAY 4, 2007]

No. 04-35468.

JAMES ODOM,
Plaintiff-Appellant,

v.

MICROSOFT CORPORATION, a Washington corporation;
BEST BUY CO., INC., a Minnesota corporation,
Defendants-Appellees.

Argued and Submitted Dec. 13, 2006
Filed May 4, 2007

Appeal from the United States District Court for the Western District of Washington; Marsha J. Pechman, District Judge, Presiding. D.C. No. CV-03-02976-MJP.

Before: MARY M. SCHROEDER, *Chief Circuit Judge*, STEPHEN REINHARDT, DIARMUID F. O'SCANNLAIN, PAMELA ANN RYMER, MICHAEL DALY HAWKINS, SIDNEY R. THOMAS, BARRY G. SILVERMAN, WILLIAM A. FLETCHER, RAYMOND C. FISHER, RICHARD A. PAEZ, MARSHA S. BERZON, RICHARD C. TALLMAN, JOHNNIE B. RAWLINSON, JAY S. BYBEE, and CARLOS T. BEA, *Circuit Judges*.

Opinion by Judge WILLIAM A. FLETCHER; Concurrence by Judge SILVERMAN; Concurrence by Judge BYBEE.WILLIAM A. FLETCHER, *Circuit Judge*:

Putative class action plaintiffs appeal from the dismissal of their suit under Federal Rule of Civil Procedure 12(b)(6) for failure to allege an "associated in fact" "enterprise" under RICO and, in the alternative, under Federal Rule of Civil Procedure 9(b) for failure to plead wire fraud with particularity. The district court dismissed with prejudice and without leave to amend.

We reverse and remand.

I. Background

Named plaintiff James Odom—then the only plaintiff—filed the first complaint in this action in the Northern District of California, alleging that defendants Microsoft and Best Buy had violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c) and (d). Odom alleged that in April 2000 defendants entered into an agreement under which "Microsoft invested $200 million in Best Buy and agreed to promote Best Buy's online store through its MSN service." MSN is a division of Microsoft offering Internet access services. In return, "Best Buy agreed to promote MSN service and other Microsoft products in its stores and advertising." Odom alleged that pursuant to their agreement, Best Buy employees distributed different Microsoft compact discs ("Trial CDs") depending on what the customer purchased. For example, a customer who purchased a computer would receive a Trial CD providing a free six-month subscription to MSN. A customer who purchased a cell phone would receive a Trial CD providing a free thirty-day subscription.

Odom alleged that if the customer was paying by debit or credit card the Best Buy employee would scan the Trial CD. If asked why the Trial CD had been scanned, the Best Buy

employee would claim it was for "inventory control or otherwise misrepresent[ ] the purpose of the scanning." Odom alleged that what this scanning actually did was send the information to Microsoft. Microsoft would then, without the customer's knowledge or permission, activate an MSN account in the customer's name. If the customer did not cancel the account before the expiration of the free trial period, Microsoft would start billing the debit or credit card number. Odom further alleged that when customers called to dispute these charges, Microsoft directed some of them to "seek relief from their debit or credit card issuers."

Odom alleged that the "policies and practices by Best Buy and its employees relating to distribution of the Trial CDs—including but not limited to the deliberate failure to make disclosures and making of misrepresentations—have been formulated and implemented by Best Buy jointly with Microsoft, by agreement with Microsoft, and/or with Microsoft's knowledge and approval for the benefit of both Best Buy and Microsoft." Odom alleged that no affected customer had been fully compensated for his or her losses, defined as (1) a full refund of the unauthorized charges; (2) a full refund of the accrued finance charges; (3) payment of interest on the money during the time it was held by Microsoft; and (4) compensation for the "time, effort, and expense" incurred in cancelling MSN accounts and seeking refunds. Odom alleged that these losses resulted from defendants' actions taken pursuant to their agreement.

Odom alleged that he purchased a laptop computer by credit card from a Best Buy store in Contra Costa County, California, in May 2002. He alleged that he told the Best Buy employee that he did not need the Trial CD because he already had another Internet service, and that the Best Buy employee did not tell him that an MSN account with Microsoft was being established in his name or that any financial obligation was being imposed on him. He further alleged that

he never used the free six-month service that came with his computer purchase. After the six-month period, Microsoft began charging his account. Odom alleged that when he noticed the charges he called Microsoft and cancelled the service.

Odom alleged that defendants' acts constituted violations of civil RICO, 18 U.S.C. §§ 1962(c) and (d). Odom alleged that Best Buy and Microsoft, acting together pursuant to their agreement, constituted an associated-in-fact enterprise under RICO; that their actions, involving "thousands" of consumers, constituted a "pattern of racketeering activity" under RICO; and that they committed the RICO "racketeering activity" predicate act of wire fraud in violation of 18 U.S.C. § 1343.

Microsoft, joined by Best Buy, moved to dismiss under Rule 12(b)(6) for failure to allege an associated-in-fact enterprise, and under Rule 9(b) for failure to plead wire fraud with particularity. Microsoft also moved to transfer the case from California to the Western District of Washington based on a forum selection clause contained in the MSN subscriber agreement. The California district court transferred the case to Washington without ruling on the motion to dismiss. After transfer, Microsoft withdrew its motion to dismiss based on Odom's indication that he intended to amend the complaint.

An amended complaint was filed on November 19, 2003. Odom continues as a plaintiff. He adds slightly more detail to the allegations made in the first complaint. He now specifies that the Best Buy store was in Pleasant Hill, California, rather than merely in Contra Costa County. He further alleges that Microsoft billed his credit card account for two months after the expiration of the six-month period, that he has paid these credit card charges, and that he has not received any refund or credit for these charges.

Katherine Moureaux-Maloney was added as a second plaintiff. Moureaux-Maloney alleges that in September 2001 she purchased a cell phone and a cell phone service plan at a Best Buy store in Reno, Nevada, using a debit card. She alleges that a Best Buy employee scanned a Trial CD and swiped her debit card, thereby sending the information to Microsoft and establishing a thirty-day trial subscription in her name. The employee did not tell Moureaux-Maloney that this was being done. Moureaux-Maloney did not know she had this service and never used it. After the thirty days elapsed, Microsoft withdrew monthly MSN charges from Moureaux-Maloney's debit card account for seventeen months without her knowledge or authorization. In November 2003, Moureaux-Maloney received a bill from Microsoft for monthly MSN charges for April, May, and June 2003 after "Microsoft was unable to continue withdrawing the charges from her debit card account." Upon receiving this bill, Moureaux-Maloney and her husband immediately contacted Microsoft and discovered that the MSN account had been established in her name through Best Buy. Upon reviewing her bank statements, she discovered the withdrawals Microsoft had made for seventeen months. Finally, Moureaux-Maloney alleges that she "has not received any refund for any of the MSN charges that Microsoft withdrew from her debit card account, and Microsoft continues to seek payment from her of MSN charges for April, May, and June 2003."

Plaintiffs expanded the enterprise-related allegations in the first complaint by further describing the agreement between Microsoft and Best Buy. The amended complaint contains the following addition:

> In Defendants' own words (in a joint press release), this agreement is "a comprehensive strategic alliance that encompasses broadband, narrowband, in-store and online efforts"; "provides for significant joint marketing in Best Buy's retail stores, online and through print/

> broadcast vehicles, profit sharing, the promotion of BestBuy.com to the 40 million users throughout Microsoft's properties, and technology assistance"; and pursuant to which "MSN™ Internet access and Microsoft's full range of connectivity solutions will be demonstrated and sold at the more than 350 Best Buy stores in the U.S. and through BestBuy.com," and "Best Buy and BestBuy.com will receive prominent and preferred placement across Microsoft Properties, including MSNBC, and the Expedia.com™ travel service, Hotmail™ Web-based e-mail service, WebTV Network™, and the newly launched MSN eShop online shopping service."

Microsoft and Best Buy again moved to dismiss the RICO claims under Rule 12(b)(6) and Rule 9(b). The district court dismissed the amended complaint on both grounds without leave to amend. It held that an associated-in-fact enterprise had not been alleged within the meaning of RICO under Rule 12(b)(6), and that wire fraud had not been pled with particularity under Rule 9(b). Plaintiffs then voluntarily dismissed their non-RICO claims in order to allow entry of final judgment. Plaintiffs appeal the dismissal of their RICO claims.

II. Standard of Review

We review de novo a dismissal for failure to state a claim under Rule 12(b)(6). *Cervantes v. United States*, 330 F.3d 1186, 1187 (9th Cir.2003). We read the complaint in the light most favorable to the non-moving party. Allegations in the complaint, together with reasonable inferences therefrom, are assumed to be true for purposes of the motion. *Associated Gen. Contractors v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th Cir.1998). A dismissal for failure to state a claim pursuant to 12(b)(6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248 (9th Cir. 1997) (internal quotation marks omitted) (quoting *Conley v.*

Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)); *see also* Fed.R.Civ.P. 8(a).

We review de novo dismissals for failure to plead with particularity under Rule 9(b). *In re Daou Sys., Inc.*, 411 F.3d 1006, 1013 (9th Cir.2005), *cert. denied*, --- U.S. ----, 126 S.Ct. 1335, 164 L.Ed.2d 51 (2006).

III. Discussion

A. RICO

The Racketeer Influenced and Corrupt Organizations ("RICO") Act, passed in 1970 as Title IX of the Organized Crime Control Act, provides for both criminal and civil liability. Pub.L. No. 91-452, § 901, 84 Stat. 922 (1970) (codified at 18 U.S.C. §§ 1961-1968). Civil RICO provides for treble damages. 18 U.S.C. § 1964(c). There has been some judicial resistance to RICO, manifested in narrow readings of its provisions by lower federal courts. In four notable cases, the Supreme Court has corrected these narrow readings.

The first case was *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), which we discuss in detail later in this opinion. The First Circuit had read RICO to prohibit only the infiltration of legitimate businesses by organized crime. *United States v. Turkette*, 632 F.2d 896, 899 (1st Cir.1980). In its view, RICO did not prohibit criminal acts by purely criminal enterprises. *Id.* The Supreme Court held that the court of appeals had "clearly departed from and limited the statutory language." *Turkette*, 452 U.S. at 581, 101 S.Ct. 2524. The Court explained:

> As a measure to deal with the infiltration of legitimate businesses by organized crime, RICO was both preventive and remedial. . . . If Congress had intended the more circumscribed approach espoused by the Court of Appeals, there would have been some positive sign that the

> law was not to reach organized criminal activities that give rise to the concerns about infiltration. The language of the statute, however—the most reliable evidence of its intent—reveals that Congress opted for a far broader definition of the word "enterprise," and we are unconvinced by anything in the legislative history that this definition should be given less than its full effect.

Id. at 593, 101 S.Ct. 2524.

The second case was *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), in which the Second Circuit had read civil RICO to impose liability only against defendants who had been criminally convicted, and only for what the court termed "racketeering injury." The Supreme Court disagreed with both propositions. It noted that the court of appeals had narrowly construed RICO in order to avoid what that court viewed as "intolerable practical consequences." *Id.* at 490, 105 S.Ct. 3275. But the Court insisted that a "less restrictive reading" was required by the text of the statute. It wrote:

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes."
>
> . . . .
>
> Underlying the Court of Appeals' holding was its distress at the "extraordinary, if not outrageous," uses to which civil RICO has been put. Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against "respected and legitimate 'enterprises.'" Yet Congress wanted to reach both "legitimate" and "illegitimate" enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. . . .

> It is true that private civil actions under the statute are being brought almost solely against such defendants, rather than against the archetypal, intimidating mobster. Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress.

Id. at 497-98, 499, 105 S.Ct. 3275 (citations omitted).

The third case was *National Organization for Women v. Scheidler*, 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994), in which the Seventh Circuit had read civil RICO to provide liability only when acts of a RICO enterprise had an economic motive. The Supreme Court refused to read such a limitation into the statute. It wrote,

> In *United States v. Turkette*, we faced the analogous question whether "enterprise" as used in § 1961(4) should be confined to "legitimate" enterprises. Looking to the statutory language, we found that "[t]here is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact."
>
> . . .
>
> The parallel to the present case is apparent. Congress has not, either in the definitional section or in the operative language, required that an "enterprise" in § 1962(c) have an economic motive.

Id. at 260-61, 114 S.Ct. 798 (citations omitted).

The fourth case was *Cedric Kushner Promotions v. King*, 533 U.S. 158, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001), a civil RICO case in which the Second Circuit had held that the president and sole shareholder of a corporation could not be a "person" who "conduct[s] or participate[s] . . . in the conduct of [the corporate] enterprise's affairs." *Id.* at 160, 121 S.Ct. 2087 (quoting 18 U.S.C. § 1962(c)) (ellipsis in original; brackets added). In the view of the court of appeals, the

president and sole shareholder was therefore not a "person" made liable under RICO. *Id.* at 161, 121 S.Ct. 2087. The Supreme Court disagreed with this narrow construction. Characterizing the question as whether the president and sole shareholder (the "person") was legally distinct from the corporation (the "enterprise"), the Court wrote, "The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more 'separateness' than that." *Id.* at 163, 121 S.Ct. 2087.

We take from these cases the general instruction that we should not read the statutory terms of RICO narrowly. Rather, as the Court wrote in *Sedima*, "RICO is to be read broadly." 473 U.S. at 497, 105 S.Ct. 3275. As Congress admonished and as the Court repeated in *Sedima*, RICO should "be liberally construed to effectuate its remedial purposes." *Id.* at 498, 105 S.Ct. 3275; RICO § 904(a).

B. Plaintiffs' Suit

Plaintiffs allege that defendants have violated two provisions of RICO. First, they allege violation of 18 U.S.C. § 1962(c), which provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Second, they allege violation of 18 U.S.C. § 1962(d), which provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

In the posture of this appeal, the survival of plaintiffs' claim under § 1962(c) will ensure the survival of their claim under § 1962(d). *See Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir.2000). We therefore address, in the remainder of this opinion, only plaintiffs' claim under § 1962(c).

To state a claim under § 1962(c), a plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima*, 473 U.S. at 496, 105 S.Ct. 3275 (footnote omitted). The only questions presented in this appeal concern requirements (2) and (4). First, Microsoft and Best Buy contend that plaintiffs have not alleged an "associated in fact" "enterprise" under RICO. Second, Microsoft and Best Buy contend that while plaintiffs have properly identified wire fraud as a predicate act of "racketeering activity," they have not pled fraud with particularity. We address these two contentions in turn.

1. Associated-in-Fact Enterprise

The definition of "enterprise" in the text of RICO is fairly straightforward. In its entirety, the definition is as follows: "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). As is evident from the text, this definition is not very demanding. A single "individual" is an enterprise under RICO. Similarly, a single "partnership," a single "corporation," a single "association," and a single "other legal entity" are all enterprises. At issue in this case is the last kind of enterprise listed in the definition—a "group of individuals associated in fact." It is undisputed that a corporation can be an "individual" for purposes of an associated-in-fact enterprise. What is disputed is the manner in which a group must be associated.

a. *United States v. Turkette*

In *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), the only Supreme Court case directly on point, defendants were alleged to have been an associated-in-fact enterprise within the meaning of §§ 1961(4) and 1962(c). In the words of the statute, they were alleged to have been a "group of individuals associated in fact" for the purpose of engaging in acts constituting "a pattern of racketeering activity." The First Circuit had agreed with defendants that RICO was designed "solely to protect legitimate business enterprises from infiltration by racketeers and that RICO does not make criminal the participation in an association which performs only illegal acts and which has not infiltrated or attempted to infiltrate a legitimate enterprise." *Id.* at 579-80, 101 S.Ct. 2524. The Supreme Court reversed, holding that a "group of individuals associated in fact" was an enterprise under RICO even if the purpose of the enterprise was exclusively criminal. *Id.* at 593, 101 S.Ct. 2524.

In the course of its analysis, the Court refuted various analytic mistakes by the court of appeals. The First Circuit's conclusion that RICO did not apply to wholly illegal enterprises depended in part on its reasoning that a contrary holding would render portions of the statute superfluous. The court of appeals had stated,

> "If 'a pattern of racketeering' can itself be an 'enterprise' for purposes of section 1962(c), then the two phrases 'employed by or associated with any enterprise' and 'the conduct of such enterprise's affairs through [a pattern of racketeering activity]' add nothing to the meaning of the section. The words of the statute are coherent and logical only if they are read as applying to legitimate enterprises."

Turkette, 452 U.S. at 582, 101 S.Ct. 2524 (quoting *United States v. Turkette*, 632 F.2d 896, 899 (1st Cir.1980) (alteration in original)).

The Supreme Court was at pains to correct the court of appeals' reading of the statute. It wrote:

> [The court of appeals' conclusion] is based on a faulty premise. That a wholly criminal enterprise comes within the ambit of the statute does not mean that a "pattern of racketeering activity" is an "enterprise." In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. *The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages.*

Id. at 583, 101 S.Ct. 2524 (citation omitted; emphasis added).

In context, this passage from *Turkette* is easy to understand. The court of appeals had mistakenly equated the term "enterprise" with the term "pattern of racketeering activity." The Supreme Court pointed out that the terms refer to two concepts that are "separate and apart" from one another: The "enterprise" is the actor, and the "pattern of racketeering activity" is an activity in which that actor engages. *See id.* These separate concepts can be expressed grammatically: As used in the italicized passage in *Turkette*, "enterprise" is the subject, and "pattern of racketeering activity" is part of the

predicate. Actions that form the "pattern of racketeering activity" are often referred to as "predicate" acts, though likely not in the grammatical sense. *See, e.g., Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168 (9th Cir.2002); *Howard*, 208 F.3d at 746. In the words of the Court, italicized above, "The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." *Turkette*, 452 U.S. at 583, 101 S.Ct. 2524.

Turkette further explained that proof of a "pattern of racketeering activity" is not, by itself, proof of an "enterprise." *Id.* "Enterprise" and "pattern of racketeering activity" are separate elements that require separate proof. In the words of the Court, "[t]he existence of an enterprise at all times remains a separate element which must be proved by the Government." *Id.* (stating that "[w]hile the proof used to establish these separate elements [of 'enterprise' and 'pattern of racketeering activity'] may in particular cases coalesce, proof of one does not necessarily establish the other").

b. Confusion in the Lower Courts

The Court's explanation of the meaning of an associated-in-fact enterprise in *Turkette* has not been clearly understood in the lower courts, including our own. We have taken this case en banc to correct and clarify our case law.

Four circuits have read the language in *Turkette* to require that an associated-in-fact enterprise have some kind of ascertainable separate structure. The formulations vary among these circuits, but they all require that there be an ascertainable organizational structure beyond whatever structure is required to engage in the pattern of illegal racketeering activity. *See, e.g., Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (8th Cir.2003) ("enterprise must have . . . an ascertainable structure distinct from the pattern of racketeering"); *United States v. Sanders*, 928 F.2d 940, 944 (10th Cir.1991) ("enterprise" requires evidence of "an ascer-

tainable structure that exist[s] apart from the commission of racketeering acts"); *United States v. Tillett*, 763 F.2d 628, 632 (4th Cir.1985) ("enterprise" requires evidence "to show that the organization had an existence beyond that which was necessary to commit the predicate crimes" (citations omitted)); *United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir.1983) ("enterprise" must have "an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses"); *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir.1982) (proof of ascertainable structure "might be demonstrated by proof that a group engaged in a diverse pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes").

The Seventh Circuit requires that there be "some" kind of ascertainable structure, but it does not require that it be a separate structure. *See, e.g., Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir.1995) (requiring proof of "an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making" (internal quotation marks and citation omitted)); *see also United States v. Rogers*, 89 F.3d 1326, 1337-38 (7th Cir.1996) (imposing "some" structural requirements, but concluding that it would be "nonsensical to require proof that an enterprise had purposes or goals separate and apart from the pattern of racketeering activity").

By contrast, four circuits have rejected any requirement that there be an "ascertainable structure," separate or otherwise, for an associated-in-fact enterprise. *See, e.g., United States v. Patrick*, 248 F.3d 11, 19 (1st Cir.2001) ("Since Congress intended the term 'enterprise' to include both legal and criminal enterprises, and because the latter may not observe the niceties of legitimate organizational structures, we refuse to import an 'ascertainable structure' requirement

into jury instructions." (citation omitted)); *United States v. Perholtz*, 842 F.2d 343, 354 (D.C.Cir.1988) (concluding that enterprise is "established by common purpose among the participants, organization, and continuity"); *United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir.1983) ("*Turkette* did not suggest that the enterprise must have a distinct, formalized structure."); *United States v. Bagaric*, 706 F.2d 42, 56 (2d Cir.1983) (stating that "it is logical to characterize any associative group in terms of what it *does*, rather than by abstract analysis of its structure" (emphasis in original)), *abrogated on other grounds by Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994).

Our own circuit has equivocated on whether an associated-in-fact enterprise must have an ascertainable separate structure and, if so, what functions that structure must serve. *See, e.g., United States v. Feldman*, 853 F.2d 648, 659-60 (9th Cir.1988) (declining to decide whether proof of ascertainable structure is necessary for an associated-in-fact enterprise because the legitimate corporations constituting the enterprise each had organizational structures); *River City Mkts., Inc. v. Fleming Foods W., Inc.*, 960 F.2d 1458, 1461 (9th Cir.1992) (concluding that "business relationship akin to a joint venture" was sufficient to establish an associated-in-fact RICO enterprise); *Chang v. Chen*, 80 F.3d 1293, 1299 (9th Cir. 1996) (explaining that "it is sufficient to show that the organization has an existence beyond that which is merely necessary to commit the predicate acts of racketeering" and citing the Third Circuit's decision in *Riccobene*, 709 F.2d at 224). The confusion in our precedents has caused difficulties for the district courts in this circuit. *See, e.g., Hansen v. Ticket Track, Inc.*, 280 F.Supp.2d 1196, 1206 (W.D. Wash.2003) ("The Court acknowledges that the Ninth Circuit case law defining an association in fact using the 'separate structure' analysis is less than clear.").

We take this opportunity to join the circuits that hold that an associated-in-fact enterprise under RICO does not require any particular organizational structure, separate or otherwise. *See Patrick*, 248 F.3d at 19 (1st Cir.2001); *Perholtz*, 842 F.2d at 355 (D.C.Cir.1988); *Cagnina*, 697 F.2d at 921 (11th Cir.1983); *Bagaric*, 706 F.2d at 55-56 (2d Cir.1983). To the extent that our past precedent suggests the contrary, it is hereby overruled. *See, e.g., Wagh v. Metris Direct, Inc.*, 348 F.3d 1102, 1112 (9th Cir.2003); *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1083-84 (9th Cir.2000); *Chang*, 80 F.3d at 1298-99, 1301.

c. No Requirement of Separate or Ascertainable Structure

As we explain above, the Supreme Court's statement in *Turkette* that an "enterprise" is "an entity separate and apart from the pattern of activity in which it engages" is not a statement that an associated-in-fact enterprise must have some kind of separate structure. 452 U.S. at 583, 101 S.Ct. 2524. Rather, it is merely a statement of the obvious: The enterprise and its activity are two separate things. One is the enterprise. The other is its activity.

To read the Court's statement in *Turkette* as requiring that an associated-in-fact enterprise have a structure beyond that necessary to carry out its pattern of illegal racketeering activities is not only to misread the particular passage of *Turkette*. It is also fundamentally to misunderstand *Turkette's* holding. The First Circuit in *Turkette* had read RICO to impose liability only when a legitimate business was infiltrated by a criminal enterprise. In the view of the court of appeals, RICO did not impose liability on purely criminal enterprises. The Supreme Court reversed.

To require that an associated-in-fact enterprise have a structure beyond that necessary to carry out its racketeering activities would be to require precisely what the Court in *Turkette* held that RICO does *not* require. Such a require-

ment would necessitate that the enterprise have a structure to serve both illegal racketeering activities as well as legitimate activities. In other words, it would require—as the First Circuit sought to require in *Turkette*—that the enterprise have a structure serving both illegitimate and legitimate purposes. But the Court in *Turkette* held precisely the opposite. It held that a purely criminal enterprise can be an associated-in-fact enterprise within the meaning of RICO. *See also Cedric Kushner Promotions*, 533 U.S. at 164-65, 121 S.Ct. 2087 (stating that RICO "protects the public from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a 'vehicle' through which 'unlawful . . . activity is committed'") (ellipsis in original; citations omitted).

Further, to require that an associated-in-fact enterprise have an "ascertainable structure"—whether that structure serves both legitimate and illegitimate activities, or only illegitimate activities—is also to misread *Turkette.* As the First Circuit stated in *Patrick*, such a requirement improperly narrows the definition of an associated-in-fact enterprise because criminal enterprises "may not observe the niceties of legitimate organizational structures." 248 F.3d at 19. There must, of course, be an associated-in-fact enterprise, as required by the statute and as explained in *Turkette.* But there is no additional requirement that the enterprise have an "ascertainable structure."

d. Criteria for an Associated-in-Fact Enterprise

The Supreme Court in *Turkette* articulated the criteria for an associated-in-fact enterprise under RICO. According to the Court, an associated-in-fact enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct." 452 U.S. at 583, 101 S.Ct. 2524. To establish the existence of such an enterprise, a plaintiff must provide both "evidence of an ongoing organization, formal or informal," and "evidence that the various associates function as a continuing unit." *Id.* We consider these criteria in turn.

i. Common Purpose

We first conclude that plaintiffs have sufficiently alleged that defendants Best Buy and Microsoft have associated for "a common purpose of engaging in a course of conduct." *Id.* According to the complaint, defendants had the common purpose of increasing the number of people using Microsoft's Internet Service, and doing so by fraudulent means. Best Buy furthered this common purpose by distributing Microsoft Internet Trial CD's and conveying its customers' debit and credit card information to Microsoft. Microsoft then used the information to activate customer accounts. These allegations are more than adequate to establish, if true, that Microsoft and Best Buy had a common purpose of increasing the number of people using Microsoft's Internet service through fraudulent means.

ii. Ongoing Organization

We next conclude that plaintiffs sufficiently alleged an "ongoing organization," either "formal or informal." *Turkette*, 452 U.S. at 583, 101 S.Ct. 2524. An ongoing organization is "a vehicle for the commission of two or more predicate crimes." *Cagnina*, 697 F.2d at 921-22 (internal quotation marks omitted) (quoting *United States v. Elliott*, 571 F.2d 880, 898 (5th Cir.1978)). According to plaintiffs, Microsoft and Best Buy formed a vehicle for the commission of at least two predicate acts of fraud. Microsoft and Best Buy established mechanisms for transferring plaintiffs' personal and financial information from Best Buy to Microsoft. That information then allowed Microsoft to activate plaintiffs' Internet accounts without their knowledge or permission. These mechanisms enabled Microsoft to bill plaintiffs improperly for MSN services in 2001, 2002 and 2003. *See United States v. Qaoud*, 777 F.2d 1105, 1117 (6th Cir.1985) (stating that "coordinated nature" of defendant's activity supported finding of RICO enterprise). The alleged cross-marketing contract between Microsoft and Best Buy provides

additional evidence of an ongoing organization. Plaintiffs allege that, in addition to the transfer of customers' information from Best Buy to Microsoft, "Best Buy agreed to promote MSN and other Microsoft products in its stores and advertising." In exchange, plaintiffs allege, "Microsoft invested $200 million in Best Buy and agreed to promote Best Buy's online store through its MSN service."

iii. Continuing Unit

Finally, we conclude that plaintiffs have alleged facts that, if proved, provide sufficient "evidence that the various associates function as a continuing unit." *Turkette*, 452 U.S. at 583, 101 S.Ct. 2524. The continuity requirement does not, in itself, require that every member "be involved in each of the underlying acts of racketeering, or that the predicate acts be interrelated in any way." *Qaoud*, 777 F.2d at 1116. Instead, the continuity requirement focuses on whether the associates' behavior was "ongoing" rather than isolated activity. *Patrick*, 248 F.3d at 19.

The allegations of plaintiffs Odom and Moureaux-Maloney describe similar methods of fraudulently charging Best Buy customers for MSN Internet accounts. Plaintiffs' allegations cover almost two years of conduct by Best Buy and Microsoft. An almost two-year time span is far more than adequate to establish that Best Buy and Microsoft functioned as a continuing unit. That several employees engaged in the activity at different times does not defeat the continuity requirement. *Cagnina*, 697 F.2d at 921 (holding that a growing membership and diversity of activities do not preclude a finding of "continuity").

iv. Conclusion

Several courts of appeals have concluded that a broad definition of an associated-in-fact enterprise would produce undesirably expansive RICO liability. For example, when the Third Circuit in *Riccobene* required that an enterprise have a

structure beyond that "necessary merely to commit each of the acts charged as predicate racketeering offenses," 709 F.2d at 224, it did so to avoid what it called the "dangers" of a broad definition. *Id.* at 221. The Third Circuit stated that it was concerned that RICO liability would extend "to situations far removed from those actually contemplated by Congress, and that federal prosecutors could use the law to invoke an additional penalty whenever they had a case involving the commission of two offenses that, coincidentally, were among those listed as 'racketeering activities.'" *Id.*

The answer to concerns like those expressed by the Third Circuit in *Riccobene* was given by the Supreme Court in *Sedima*, when it rebuked the Second Circuit for having interpreted RICO to avoid what the court of appeals had called the "'extraordinary, if not outrageous,' uses to which civil RICO had been put." 473 U.S. at 499, 105 S.Ct. 3275. The Court's response was to point to the text of the statute: "It is true that private civil actions under the statute are being brought almost solely against [legitimate] defendants, rather than against the archetypal, intimidating mobster. Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress." *Id.* (footnote omitted).

In *Turkette*, the Supreme Court carefully articulated the criteria for an associated-in-fact enterprise under RICO. We do not believe that we are at liberty to add to them. Applying the criteria articulated in *Turkette*, we conclude that plaintiffs have sufficiently alleged an associated-in-fact enterprise.

2. Pleading Fraud with Particularity

Federal Rule of Civil Procedure 9(b) requires that fraud be pled with particularity. It provides: "In all averments of fraud . . . , the circumstances constituting fraud . . . shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred gen-

erally." Rule 9(b) "requires the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1400 (9th Cir.1986) (internal quotation marks omitted) (quoting *Bosse v. Crowell Collier & Macmillan*, 565 F.2d 602, 611 (9th Cir.1977)). "[T]he pleader must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Id.* at 1401; *see also Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir.1989). While the factual circumstances of the fraud itself must be alleged with particularity, the state of mind—or scienter—of the defendants may be alleged generally. *See In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547 (9th Cir.1994) (en banc) ("We conclude that plaintiffs may aver scienter generally, just as the rule states—that is, simply by saying that scienter existed.").

"[A] wire fraud violation consists of (1) the formation of a scheme or artifice to defraud; (2) use of the United States wires or causing a use of the United States wires in furtherance of the scheme; and (3) specific intent to deceive or defraud." *Schreiber*, 806 F.2d at 1400 (citation omitted); *see also United States v. McNeil*, 320 F.3d 1034, 1040 (9th Cir. 2003). To the degree that the first requirement—the formation of a scheme or artifice to defraud—requires a showing of the defendants' state of mind, general rather than particularized allegations are sufficient. Similarly, the third requirement—specific intent to deceive or defraud—requires only a showing of the defendants' state of mind, for which general allegations are sufficient. The only aspects of wire fraud that require particularized allegations are the factual circumstances of the fraud itself.

Plaintiff Odom specifically alleges that he bought a laptop computer from a Best Buy store in Pleasant Hill, California, in May 2002; that he told the Best Buy employee when he

purchased the computer that he did not need the Trial CD and the MSN service because he already had an Internet service provider; that the employee nevertheless scanned the Trial CD and swiped Odom's credit card, thereby sending the information to Microsoft by wire and establishing an account for Microsoft's MSN service without his knowledge or permission; that Microsoft billed him for two months of the MSN service that had been provided without his knowledge or permission; and that he has not been compensated for his losses. Odom does not allege the name of the Best Buy employee who sold him the computer and established his MSN account.

Plaintiff Moureaux-Maloney specifically alleges that she bought a cell phone and a cell phone plan from a Best Buy store in Reno, Nevada, in September 2001; that the Best Buy employee scanned a Trial CD and swiped her debit card, thereby sending the information to Microsoft by wire and establishing an account for Microsoft's MSN service without her knowledge or permission; that Microsoft withdrew monthly MSN payments from her debit card account for seventeen months without her knowledge or permission; that Microsoft sent her a bill for monthly MSN services for April, May, and June 2003 after Microsoft was unable to withdraw money from her debit card account; and that Microsoft has not compensated her for losses attributable to the seventeen months of withdrawals from her account, and has continued to bill her for the three-month period in 2003. Like Odom, Moureaux-Maloney does not allege the name of the Best Buy employee who sold her the cell phone and established her MSN account.

The only arguable deficiency in Odom and Moureaux-Maloney's allegations of wire fraud is that the names of the individual Best Buy employee who established their MSN accounts are not alleged. We hold for two reasons that, in the circumstances of a retail transaction whose full consequences

are realized only months later, the employee of the store need not be named. First, it is unrealistic to expect that the retail customer would remember the name of the cash register employee. A requirement that the employee be named as a precondition of bringing suit and commencing discovery would, as a practical matter, defeat almost any suit based on such a fraud. Second, as we noted above, Rule 9(b) "requires the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Schreiber*, 806 F.2d at 1400. In the circumstances of this case, we have been given no reason to believe that defendants will be hampered in their defense by Odom and Moureaux-Maloney's inability to name the particular employees.

We therefore hold that plaintiffs' allegations of the circumstances of wire fraud are sufficiently particularized to satisfy the pleading requirements of Rule 9(b).

IV. Conclusion

For the foregoing reasons, we hold that plaintiffs have sufficiently alleged the existence of an associated-in-fact enterprise within the meaning of 18 U.S.C. §§ 1961(4) and 1962(c). We also hold that plaintiffs have alleged wire fraud with sufficient particularity to satisfy Rule 9(b). We therefore reverse the decision of the district court and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

SILVERMAN, *Circuit Judge*, with whom RYMER, TALLMAN, RAWLINSON, and BEA, Circuit Judges, join, concurring in the result:

I do not see how Odom's complaint successfully pleads an "enterprise" within the RICO statute.

The language in *Turkette* is the starting point. An "enterprise" is "a group of persons associated together for a

common purpose," and is proven by "evidence of an ongoing organization, formal or informal" and "evidence that the various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981).

Paragraph 34 of Odom's complaint alleges only the following with respect to defining the associated-in-fact "enterprise" element:

> Defendants's agreement that Microsoft will advertise and promote Best Buy and its online store on its MSN Internet access service and various Microsoft-owned Websites, while Best Buy will advertise and promote MSN service in its "bricks and mortar" and online stores, together with Defendants' activities in furtherance of the agreement, constitute an "enterprise" as defined in 18 U.S.C. § 1961(4).

Nothing in this paragraph fairly alleges an "ongoing organization" between Microsoft and Best Buy. It merely states that the existence of a marketing contract and the performance of that contract by two parties constitute an enterprise. Stated differently, the Complaint assumes that if two parties perform a series of "predicate acts" for each other's benefit pursuant to a commercial agreement, they *ipso facto* constitute an "enterprise."

I cannot agree. RICO targets a more sophisticated crowd: those persons or entities associated in fact with "ongoing organization"—some minimal structure, coordination, or ordering principle to distinguish them from a run-of-the-mill conspiracy. *See Chang v. Chen*, 80 F.3d 1293, 1300 (9th Cir.1996) ("A conspiracy . . . is not an enterprise for purposes of RICO."); *see also Turkette*, 452 U.S. at 589, 101 S.Ct. 2524 (noting that the declared purpose of RICO was "to seek the eradication of *organized* crime" (emphasis added and citation omitted)). This distinction is highlighted in our cases

and those of our sister circuits. *See, e.g., United States v. Patrick*, 248 F.3d 11, 19 (1st Cir.2001) (noting that the gang "had older members who instructed younger ones, its members referred to the gang as family, and it had 'sessions' where important decisions were made"); *United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir.1996) (asking whether the enterprise has a structure "organized in a manner amenable to hierarchical or consensual decision-making" (citation and internal quotation omitted)); *Chang*, 80 F.3d at 1299 (asking whether the enterprise's "structure . . . provide[s] some 'mechanism for controlling and directing the affairs of the group on an on-going, rather than an ad hoc, basis' ") (quoting *United States v. Riccobene*, 709 F.2d 214, 222 (3d Cir.1983)); *United States v. Perholtz*, 842 F.2d 343, 363 (D.C.Cir.1988) ("The same group of individuals who repeatedly commit predicate offenses do not necessarily comprise an enterprise. An extra ingredient is required: organization.").

There is nothing in the complaint to suggest "ongoing organization" between Best Buy and Microsoft *after* the ink dried on their alleged agreement—no partnership, joint venture, consultation, concerted action, or joint decision-making. On this score, Odom alleged nothing more than a contract and its performance. As a result, the district court correctly dismissed Odom's complaint.[1]

I reject the majority's reference to the alleged "'coordinated' behavior of the two entities"—the transfer of cus-

---

[1] To the extent the complaint alleges that decisions "are made by Defendants jointly," it does not allege that the joint decision-making was sufficiently systematic to constitute "ongoing organization"—some "system of authority that guide[s] the operation of the alleged enterprise" beyond the initial contract, *Chang*, 80 F.3d at 1300, or, as the Third Circuit has aptly put the point, a "mechanism for controlling and directing the affairs of the group on an ongoing, rather than an ad hoc, basis." *Riccobene*, 709 F.2d at 222.

tomer financial information and other cross promotional activities between Microsoft and Best Buy—as satisfying the pleading requirement for "ongoing organization." *See* Maj. Op. at 552. Odom's complaint narrowly defines the "enterprise" as only the marketing agreement between Best Buy and Microsoft together and their activities in furtherance of that agreement. It is not for us to buttress paragraph 34 with facts that Odom could have, but did not allege to define the "enterprise."

Nevertheless, I vote to reverse because the district court should have granted Odom leave to amend his complaint. When the district court hinted that it was thinking about dismissing the RICO claim, plaintiffs' counsel offered to "elaborate" on how the complaint could be amended to "plead within the statute," but the district court declined to entertain additional argument on the matter. Because there may be facts which if properly pled would satisfy the RICO "enterprise" element, and given Rule 15(a)'s mandate that "leave shall be freely given," the district court's failure to do so was error.

BYBEE, Circuit Judge, joined by Judge REINHARDT, concurring:

It strikes me as outlandish that what Judge Silverman correctly describes as a "marketing contract" between Microsoft and Best Buy could subject them to a private RICO action. Slip Op. at 555 (Silverman, J., concurring in the result). But my concerns were voiced and dismissed more than twenty years ago. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-99, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). I therefore join Judge Fletcher's opinion for the court.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C03-2976P

JAMES ODOM, on behalf of himself and
all others similarly situated
Plaintiffs,

v.

MICROSOFT CORPORATION, a Washington corporation;
BEST BUY CO., INC., a Minnesota corporation,
Defendants.

ORDER DISMISSING COUNTS ONE AND TWO
OF THE FIRST AMENDED COMPLAINT

This matter comes before the Court on defendants' Motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO") and the Electronic Funds Transfer Act ("EFTA"). The Court heard oral arguments on March 12, 2004, and gave counsel leave to file additional pleadings regarding the EFTA claim. Having reviewed the papers and pleadings submitted by the parties, and having heard oral arguments by all parties, the Court hereby GRANTS IN PART the motion to dismiss with respect to the RICO claims.

BACKGROUND

This is a putative class action against defendants the Microsoft Corporation ("Microsoft") and Best Buy Stores, L.P., erroneously sued as Best Buy, Co., Inc. ("Best Buy")

(together "defendants"). Defendants entered into a joint merchandising agreement in April 2000, under which the two companies agreed to promote one another's products and to share profits from the joint marketing. One feature of the joint marketing agreement was that a trial membership to the Microsoft Network ("MSN") internet service would be included with every purchase of certain products from Best Buy stores.

This suit arises out of sales transactions at Best Buy stores during which Best Buy employees allegedly activated a "trial" MSN service account without the customer's consent or awareness. Plaintiffs allege that MSN accounts were activated without disclosure to the customer, that the customer's debit or credit card information was transmitted to Microsoft, and that upon the expiration of the trial period, customers were billed monthly for services they were as yet unaware they had been signed up for. Monthly billing continued until the customer contacted Microsoft to have the service cancelled.

Plaintiffs assert that the experiences of named plaintiffs Katherine Moreaux-Maloney and James Odom are representative of the experience of numerous customers at Best Buy stores. Named plaintiff Katherine Moreaux-Maloney bought a cellular phone and a cellular service plan in September 2001 from a Best Buy store in Reno, Nevada, and paid with a debit card. Named plaintiff James Odom bought a laptop computer in May 2002 from a Best Buy store in Pleasant Hill, California, and paid on a credit card. Plaintiffs allege that at the time of the purchase, the Best Buy employee who processed the sale transaction scanned the bar code from a compact disc ("trial CD") containing a trial membership to MSN. Scanning the trial CD automatically activated an MSN service account in the customer's name, and because the account is activated in conjunction with the customer's payment on debit or credit card, that card's information is transmitted to Microsoft.

According to the complaint, neither plaintiff was told by the Best Buy employee at the checkout counter that an MSN account was activated, or that the customer's debit or credit card information was being sent to Microsoft. Plaintiffs allege that in some cases Best Buy employees made misleading statements to prevent the customer's discovery of MSN account activation. Neither named plaintiff used the MSN service after the purchase, since neither knew that she was subscribed to the service. Ms. Moreaux-Maloney's trial subscription lasted for thirty days, while Mr. Odom's trial subscription lasted for six months. At the end of the trial period, each plaintiff was billed monthly by Microsoft on the card used for payment at Best Buy. Mr. Odom discovered the charge on his credit card bill two months after billing began. Ms. Moreaux-Maloney did not discover the monthly transfers from her bank account to Microsoft until March 2003, eighteen months after her Best Buy purchase and seventeen months after the billings began. After cancellation of the accounts, Microsoft directed plaintiffs to seek refunds from their credit card company and bank, respectively. To date, it is alleged that no plaintiff has yet been compensated in full for the amounts paid to Microsoft, interest on those amounts for the time the money was in Microsoft's possession, finance charges on amounts outstanding on credit cards, and compensation for the time and energy spent to get refunds.

PROCEDURAL BACKGROUND

The initial complaint in this case was filed on May 15, 2003, in District Court for the Northern District of California, San Francisco Division. (Dkt. No. 45, p. 31). At the same time, plaintiffs' attorneys filed state court class actions in California and Washington based on the same set of facts. The Washington State case is currently proceeding, and the California court stayed the action in that state pending further proceedings in the Washington state case.

The initial complaint in federal court raised two claims, both under RICO. (Dkt. No. 45, p. 40). On Microsoft's motion, the case was transferred to this District on October 1, 2003, under a forum selection clause in the MSN account contract activated at the time of the sale at Best Buy. (Dkt. No. 45). Microsoft struck its simultaneous Motion to Dismiss based on plaintiffs' indicated intent to amend the complaint.

Plaintiffs filed a First Amended Complaint on November 19, 2003. That complaint added named plaintiff Ms. Moreaux-Maloney, as well as claims under the Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693 *et seq.*, the Washington Consumer Protection Act, R.C.W. § 19.86.010 et seq., and for unjust enrichment. (Dkt. No. 57).

This Motion to Dismiss follows the First Amended Complaint.

ANALYSIS

1. 12(b)(6) Legal Standard

A motion to dismiss under Rule 12(b)(6) will only be granted if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his complaint which would entitle him to relief." *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 248 (9th Cir. 1997). Dismissal of a complaint under a 12(b)(6) motion should be without prejudice unless it is clear that amendment could not possibly cure the complaint's deficiencies. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998), *see also Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996).

Review of a 12(b)(6) motion "is limited to the contents of the complaint . . . [and] all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Chang*, 80 F.3d at 1296 (citing *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989); *Everest and Jennings, Inc. v. American Motorists Ins. Co.*, 23 F.3d

226, 228 (9th Cir. 1994)). Conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss. *Associated Gen. Constr. v. Metro. Water District*, 159 F.3d 1178, 1181 (9th Cir. 1998).

2. Claims Under RICO, 18 U.S.C. 1962

Plaintiffs' first two claims are brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), which prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). Subsection (d) of the same section makes it unlawful to conspire to violate any provision of RICO.

To prove a violation of RICO § 1962 (c), plaintiffs must establish the existence of an enterprise that affected interstate or foreign commerce, the defendants' employment by or association with the enterprise, that the defendant conducted or participated, directly or indirectly in the conduct of the enterprise's affairs, and that the participation was through a pattern of racketeering activity. *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1309-10 (9th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993). Defendants contend that plaintiffs fails to allege facts that support a finding of the existence of an enterprise or of the predicate acts of racketeering activity.

A. Existence of an "Enterprise" under RICO

RICO defines an "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). An enterprise is a group of persons associated together for a common purpose of engaging in a course of conduct, proved by evidence of an

ongoing organization, either formal or informal, and that the various associates function as a continuing unit. *United States v. Turkette*, 452 U.S. 576, 583 (1981). Though the evidence used to establish the enterprise as an entity may overlap with the evidence that proves the predicate acts of the racketeering activity, "proof of one does not necessarily establish the other." *Id.* In other words, the plaintiff must prove the existence of the enterprise as an entity separate and apart from the pattern of activity in which it engages. *Id.*

Ninth Circuit case law defining the "separate structure" requirement is less than clear. The separate structure requirement can be satisfied by a corporation's involvement in the racketeering activity because it has a legal existence and conducts legal activities distinct from the alleged racketeering activities. *Chang v. Chen*, 80 F.3d 1293, 1300 (9th Cir. 1996); *Cf. Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1083-84 (9th Cir. 2000) (separate structure requirement unsatisfied by the legal corporate structures of numerous defendant insurance companies, employee benefit plans, employers, and government entities where the plaintiff did not allege a separate structure linking the defendants beyond the alleged conspiratorial behavior). The Ninth Circuit has found joint ventures between corporate entities to be RICO enterprises, but only where the joint ventures possess the required characteristics of an enterprise. *See United Energy Owners Committee, Inc. v. United Energy Management Systems. Inc.*, 837 F.2d 356, 363-64 (9th Cir. 1988); *see also Medallion Television Enterprises v. SelecTV of California. Inc.*, 833 F.2d 1360 (9th Cir. 1987). Notably, the cases where joint ventures constituted enterprises predate *Chang*, the controlling case in the Ninth Circuit. Though none is specifically overruled by *Chang*, it is evident that this Circuit's standard was less stringent prior to that ruling. *See, e.g. United Energy*, 837 F.2d at 364 (finding the enterprise "at least somewhat separate" from the racketeering activity conducted."). Thus, where an enterprise consists of a joint venture, the venture

must still meet the characteristics established in *Chang* to indicate an enterprise separate and distinct from its alleged illegal conduct.

Methods for directing group decision-making and for dispersing the proceeds of alleged illegal transactions are highly indicative of the separate structure required of a RICO enterprise. *Chang*, 80 F.3d at 1299; *Simon*, 208 F.3d at 1083-84. A structure for making decisions is characterized by a method of ongoing, rather than ad hoc control over the group's affairs. *Id.* An agreement to disburse proceeds of alleged racketeering activity does not demonstrate a disbursement structure separate and apart from the predicate acts where the funds are dispersed according to ordinary business practices. *Chang*, 80 F.3d at 1300. In *Simon v. Value Behavioral Health, Inc.*, the court's analysis considered the *Chang* characteristics of (1) a structure beyond the racketeering activity, (2) a separate system of authority guiding the enterprise's operation, and (3) a structure separate from the predicate acts to distribute the proceeds of the allegedly fraudulent transactions as factors that indicate the existence of an enterprise. 208 F.3d at 1083-84. Finding allegations of each factor absent, the court determined there was no RICO enterprise. *Id.*

Allegations of conspiracy do not state a claim under RICO § 1962(c). In *Chang*, the court found that when a member of that alleged enterprise agreed to perform his role in the alleged racketeering conspiracy, "he entered into a conspiracy to commit the predicate acts of racketeering activity." 80 F.3d at 1300. The court specified that "[a] conspiracy, however, is not an enterprise for purposes of RICO." *Id.*; *Simon*, 208 F.3d at 1083.

Plaintiffs in this case have not alleged the existence of an enterprise separate and distinct from the alleged racketeering activity. Plaintiffs argue that "[a] reasonable inference is that the account activations are implemented through a set of

personnel and procedures different from those responsible for other alliance marketing activities. . . . [i]t would be unreasonable to assume the contrary." (Dkt. No. 75 at 12). As an initial matter, the argument is entirely based on an "inference," rather than concrete factual allegations. Conclusory allegations and unwarranted inferences are not sufficient to defeat a motion to dismiss. *Associated Gen. Constr. v. Metro. Water District*, 159 F.3d 1178, 1181 (9th Cir. 1998).

Furthermore, even if plaintiffs' inference is assumed to be true for the purposes of this motion, the circumstances described in plaintiffs' pleadings do not indicate a separate enterprise under the *Chang* factors. Though there are allegations that the enterprise pursued legal activities as well as illegal ones, allegations of a separate structure that engaged in the predicate acts of mail and wire fraud are noticeably absent from the complaint. There is no allegation that there was a subset of actors carrying out illegal activities separately from those carrying out legal marketing activities. Except for the general statement that decisions guiding the enterprise are "made jointly" by Microsoft and Best Buy, there are no allegations that describe a method through which decisions are made and the performance of various participants can be guided, or a subset of executives that direct the racketeering activities. While Microsoft technicians may indeed be separate from Microsoft marketers, an additional inference is required to conclude that Microsoft technicians and Best Buy sales staff are cohorts in a separate structure.

Finally, plaintiffs' allegation that "for each MSN trial subscription activated at Best Buy, Best Buy receives a flat payment . . . [and later] receives a portion of each monthly MSN charge paid by the customer" does not indicate a structure for distributing proceeds separate from the predicate acts. The fact that defendants have agreed to split the proceeds from MSN accounts is not distinct from the act of activating and charging the accounts where, as here, a profit-sharing

arrangement is typical of a joint-merchandising agreement. In short, because the complaint does not sufficiently allege a separate enterprise, a separate system of authority from the one that directed the alleged racketeering activity, or a separate structure that disbursed proceeds from the alleged wire fraud, plaintiffs have failed to demonstrate anything more than a conspiracy—and a conspiracy does not satisfy RICO's enterprise requirement.

Since plaintiffs do not state a claim for a violation of § 1692(c), their claim for conspiracy to violate that section necessarily fails. A claim under subsection (d) is dependent on a claim under one of the previous subsections. *Wagh v. Metris Direct, Inc.*, 348 F.3d 1102, 1112, as amended by 352 F.3d 1187 (9th Cir. 2003); *Simon v. Value Behavioral Health. Inc.*, 208 F.3d 1073, 1084 (9th Cir. 2000); *see also Howard v. America Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000), *cert. denied*, 531 U.S. 828 (2000).

B. Pleading Predicate Acts of Racketeering Activity with Sufficient Particularity

Defendants' second basis for dismissal of the RICO claims is that plaintiffs have not plead with sufficient particularity that either Microsoft or Best Buy engaged in racketeering activity, specifically in the predicate act of wire fraud. A wire fraud complaint must allege (1) the existence of a scheme to defraud; (2) the defendant's knowing or intentional participation in the scheme; (3) specific intent to deceive or defraud; and (4) the use of the U.S. wires or causing a use of U.S. wires in furtherance of the scheme. *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1400 (9th Cir. 1986); *Perez v. Volvo Car Corp.*, 247 F.3d 303, 312-313 (1st Cir. 2001). Wire fraud allegations are subject to the pleading requirements of Federal Rule of Civil Procedure 9(b). *Schreiber*, 806 F.2d at 1401. Defendants argue that plaintiffs make only conclusory allegations and fail to describe with any particularity the defendants' respective roles in the

scheme, scienter on the part of either defendant, or an intent to deceive or defraud customers by either Best Buy sales staff or their supervisors.

Plaintiffs have not alleged facts that connect Microsoft to actions by Best Buy employees, nor have they specified the Best Buy policy under which the allegedly fraudulent acts are taken. Facts that indicate Microsoft's notification of consumer displeasure after the alleged fraud took place does not suffice to demonstrate Microsoft's knowledge or participation in a plan to defraud. Though specific intent may be averred generally from the scheme itself, it must be predicated on factual allegation of a scheme. *See Sun Savings and Loan Association v. Dierdorff*, 825 F.2d 187, 195-96 (9th Cir. 1987); *Schreiber*, 806 F.2d at 1400. Because plaintiffs have not alleged the existence of a scheme or the defendant corporations' knowledge and intent in executing that scheme, the predicate acts of racketeering have not been established.

CONCLUSION

The Court concludes that plaintiffs have not met their burden under the requirements of Federal Rules of Civil Procedure 12(b)(6) and Rule 9(b) to allege facts supporting claims under RICO. The Court therefore GRANTS defendants' motion to dismiss and DISMISSES claims One and Two of the First Amended Complaint.

The Clerk is directed to send copies of this order to all attorneys of record.

Dated: March __, 2004.

_____

Marsha J. Pechman
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed JUN 4, 2007]

No. 04-35468
D.C. No. CV-03-02976-MJP
Western District of Washington, Seattle

JAMES ODOM,
Plaintiff - Appellant,

v.

MICROSOFT CORPORATION, a Washington corporation;
BEST BUY CO., INC., a Minnesota corporation,
Defendants - Appellees.

ORDER

Before: W. FLETCHER, *Circuit Judge.*

Upon due consideration of Appellee Microsoft's motion to stay the mandate of this Court pending the filing of a petition for writ of certiorari, such petition to be filed within 90 days of this Order,

IT IS ORDERED that the motion to stay of mandate be GRANTED.*

---

* In the event that the petition for writ of certiorari is timely filed, "the stay shall continue until final disposition by the Supreme Court." Fed. R. App. P. 41(d)(2)(B).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed JUN 28, 2007]

No. 04-35468
D.C. No. CV-03-02976-MJP
Western District of Washington, Seattle

JAMES ODOM,
Plaintiff - Appellant,

v.

MICROSOFT CORPORATION, a Washington corporation;
BEST BUY CO., INC., a Minnesota corporation,
Defendants - Appellees.

ORDER

Before: W. FLETCHER, *Circuit Judge.*

Plaintiff-Appellant's motion for reconsideration of the order granting the stay of mandate, filed June 6, 2007, is hereby DENIED.

APPENDIX E

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

[Filed Sept. 28, 2006]

No. 04-35468

JAMES ODOM,
Plaintiff-Appellant,

v.

MICROSOFT CORPORATION, a Washington corporation;
BEST BUY CO., INC., a Minnesota corporation,
Defendants-Appellees.

ORDER

Before MARY M. SCHROEDER, *Chief Judge*.

Upon the vote of a majority of nonrecused regular active judges of this court,[1] it is ordered that this case be reheard by the *en banc* court pursuant to Circuit Rule 35-3.

---

[1] Judges Pregerson, McKeown, Wardlaw, Gould, Clifton, Smith, and Ikuta are recused.

No. 07-138

FILED
SEP 5 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

JAMES ODOM et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DANIEL C. GIRARD
Counsel of Record
AARON M. SHEANIN
AMANDA M. STEINER
GIRARD GIBBS LLP
601 California St., 14th Fl.
San Francisco, CA 94108
Telephone: (415) 981-4800

ANTHONY K. LEE
Attorney at Law
580 California St., 16th Fl.
San Francisco, CA 94104
Telephone: (415) 439-4862

BETH E. TERRELL
TOBY J. MARSHALL
TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Ave., Suite 2200
Seattle, WA 98101
Telephone: (206) 682-5600

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

SUMMARY OF ARGUMENT 1

REASONS FOR DENYING THE PETITION 2

I. MICROSOFT PRESENTS NO COMPELLING REASON WHY THIS COURT SHOULD REVIEW THE NINTH CIRCUIT'S HOLDING ON THE CRITERIA FOR AN ASSOCIATION-IN-FACT ENTERPRISE 2

A. Microsoft Fails To Show Why A Circuit Split That Has Existed For Over Two Decades Need Be Resolved Now 2

B. Review Of The Ninth Circuit's Judgment Would Have Little Effect On The Proceedings Below 6

C. At Any Rate, The Ninth Circuit's Holding Is Correctly Based On A Straightforward Application Of *Turkette* 9

II. MICROSOFT PRESENTS NO COMPELLING REASON WHY THIS COURT SHOULD REVISIT WHETHER AN ASSOCIATION-IN-FACT ENTERPRISE CAN CONSIST OF A GROUP OF CORPORATIONS 11

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Anza v. Ideal Steel Supply Corp., 126 S. Ct. 1991 (2006) 12

Chang v. Chen, 80 F.3d 1293 (9th Cir. 1996) 7

Hastings v. Fidelity Mortgage Decisions Corp., 984 F. Supp. 600 (N.D. Ill. 1997) 7

Mohawk Indus. v. Williams, 126 S. Ct. 2016 (2006) 2, 11, 12, 13

Richmond v. Nationwide Cassel L.P., 52 F.3d 640 (7th Cir. 1995) 4

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 5, 6

United States v. Cianci, 378 F.3d 71 (1st Cir. 2004) 10

United States v. Johnson, 440 F.3d 832 (6th Cir.), *cert. denied*, 127 S. Ct. 48 (2006) 4

United States v. Lemm, 680 F.2d 1193 (8th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983) 7

United States v. Mazzei, 700 F.2d 85 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983) 6, 11

United States v. Olson, 450 F.3d 655 (7th Cir. 2006) 4

United States v. Perholtz, 842 F.2d 343 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988) 3, 10, 14

United States v. Riccobene, 709 F.2d 214 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983) 4

United States v. Rogers, 89 F.3d 1326 (7th Cir.), *cert. denied*, 519 U.S. 999 (1996) 4

United States v. Turkette, 452 U.S. 576 (1981) ... 1, 5, 9, 10, 11

TABLE OF AUTHORITIES – Continued

Page

United States v. Weinstein, 762 F.2d 1522 (11th Cir.), *modified, reh'g denied in part*, 778 F.2d 673 (11th Cir. 1985), *cert. denied*, 475 U.S. 1110 (1986) 4

Williams v. Mohawk Indus., 465 F.3d 1277 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 1381 (2007) 13

Williams v. Mohawk Indus., 411 F.3d 1252 (11th Cir.), *cert. granted in part*, 546 U.S. 1075 (2005), *limited cert. dismissed, cert. granted, vacated, remanded*, 126 S. Ct. 2016 (2006) 11-12

STATUTES

18 U.S.C. § 1961(3), (4) 13

18 U.S.C. § 1962(c) 13

SUMMARY OF ARGUMENT

Microsoft's petition should be denied. True, there is a circuit split on the degree of structure required for an association-in-fact RICO enterprise. The split has already existed for over twenty years, however, apparently with few ill effects – too few, in any case, to warrant resolution by this Court. Furthermore, even if the Court were inclined to decide the matter now, this case is far from an ideal vehicle for the purpose. A holding that the Ninth Circuit erred – and that an association-in-fact enterprise must have a structure beyond that necessary for the predicate racketeering activity – would not end the litigation, as Respondents plead, or could readily amend their complaint to plead, a separate structure.

At any rate, the Ninth Circuit holding is correct. This Court's opinion in *United States v. Turkette*, 452 U.S. 576 (1981), sets forth the elements of an association-in-fact enterprise: a common purpose; an ongoing organization; and the functioning of the associated persons as a continuing unit. *Turkette* leaves no room for a "separate structure" requirement. Qualifying or abandoning *Turkette* will not solve the problem: nothing in RICO suggests an association-in-fact enterprise must have a "separate structure." And requiring such a structure would yield the perverse result that informally structured criminal enterprises would be excluded.

Lacking persuasive legal arguments, Microsoft argues policy: American business will suffer unless this Court imports a separate-structure requirement into the definition of an association-in-fact RICO enterprise. Setting aside the interpretive problems with Microsoft's argument, narrowing the range of enterprises which qualify will not

deter civil RICO litigation, as most corporate association-in-fact enterprises (including the $200 million joint venture at issue in this appeal) would satisfy the separate-structure requirement.

Microsoft also presents no compelling reason to decide whether a group of corporations can constitute an association-in-fact enterprise. There is no inter-circuit conflict on the matter. All ten circuits that have considered the question have answered it in the affirmative. Furthermore, the issue was before this Court only two terms ago, in *Mohawk Industries, Inc. v. Williams*, No. 05-465 (argued April 26, 2006). The parties in that case briefed the question thoroughly and discussed it extensively at oral argument. The Court nevertheless declined to decide the issue. Microsoft fails to show why it should do so now.

REASONS FOR DENYING THE PETITION

I. MICROSOFT PRESENTS NO COMPELLING REASON WHY THIS COURT SHOULD REVIEW THE NINTH CIRCUIT'S HOLDING ON THE CRITERIA FOR AN ASSOCIATION-IN-FACT ENTERPRISE.

A. Microsoft Fails To Show Why A Circuit Split That Has Existed For Over Two Decades Need Be Resolved Now.

Microsoft asserts the Court should review the judgment below simply because the Ninth Circuit's holding represents one side of a circuit split on whether an association-in-fact enterprise requires an ascertainable structure beyond that necessary to carry out the predicate acts of racketeering. While the Court may grant certiorari

to resolve an inter-circuit conflict, Microsoft has presented no compelling reason why the Court should do so here.

In the Ninth Circuit's view, there is now a four-four-one split on the issue among the courts of appeals, with the Third, Fourth, Eighth, and Tenth Circuits requiring an ascertainable structure beyond that needed for the racketeering activity; the First, Second, Ninth, Eleventh, and District of Columbia Circuits requiring no ascertainable structure of any kind; and the Seventh requiring some sort of structure, although not necessarily one with an existence beyond that needed for the predicate acts. (*See* Pet. Cert., App. at 14a-16a.) By Microsoft's reckoning, there is a seven-four split, with the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits requiring an ascertainable structure beyond that needed for the predicate acts, and the First, Second, Ninth, and Eleventh requiring none. (*See* Pet. Cert. at 9 & n.3.)

Microsoft's count is incorrect. Notwithstanding Petitioner's assertions, the Ninth Circuit correctly interpreted *United States v. Perholtz*, 842 F.2d 343 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988), and appropriately included the D.C. Circuit as not requiring an ascertainable structure.[1] Furthermore, the Sixth and Seventh Circuits seem to require a structure only in the sense that the enterprise must have continuity through time, have unity of purpose,

---

[1] *See Perholtz*, 842 F.2d at 364 (approving jury instruction stating, "'*It is not necessary that the enterprise*, if it existed, *have any particular or formal structure* but it must have sufficient organization that its members function and operated [sic] together in a coordinated manner in order to carry out the common purpose alleged.'") (emphasis added).

and be organized so as to enable hierarchical or consensual decision-making.[2]

In the final analysis, though, the precise score is irrelevant. The most important fact is that the circuit split has already existed in one form or another for over twenty years.[3] During this time, it seems to have posed no undue problem for courts, litigants, or the development of the law – at any rate, not enough to warrant resolution by this Court.[4] Microsoft fails to explain why the Court, having

---

[2] *See Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995) ("A RICO enterprise is an ongoing 'structure' of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making.") (internal quotation marks omitted); *see also United States v. Olson*, 450 F.3d 655, 664 (7th Cir. 2006) ("We have held that in informal organizations such as criminal groups, there 'must be some structure, to distinguish an enterprise from a mere conspiracy, but there need not be much.' "); *United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996) ("The continuity of an informal enterprise and the differentiation among roles can provide the requisite 'structure' to prove the element of 'enterprise.' "), *cited with approval in United States v. Johnson*, 440 F.3d 832, 840 (6th Cir.), *cert. denied*, 127 S. Ct. 48 (2006).

[3] *Compare, e.g., United States v. Weinstein*, 762 F.2d 1522, 1537 n.13 (11th Cir.) ("The appellants in *Hewes* argued that . . . a RICO enterprise must possess an 'ascertainable structure' distinct from the associations necessary to conduct the pattern of racketeering activity. . . . Our cases have repeatedly rejected this contention and we reiterate that rejection here."), *modified, reh'g denied in part*, 778 F.2d 673 (11th Cir. 1985), *cert. denied*, 475 U.S. 1110 (1986), *with United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir.) ("[I]t is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity, but rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses."), *cert. denied*, 464 U.S. 849 (1983).

[4] Indeed, to some extent, the circuit split is one of semantics. The "structure" that seems necessary in the Sixth and Seventh Circuits is little different from the showing now required for an association-in-fact

(Continued on following page)

refrained from deciding the matter for the past twenty years, should do so now. For instance, Microsoft cannot claim the Ninth Circuit's holding adds a new voice to the debate, as with its opinion the Court of Appeals merely switched sides, expressly overruling previous decisions stating that a separate ascertainable structure *was* required for an association-in-fact enterprise. (*See* Pet. Cert., App. at 17a.)

Furthermore, no weight should be given to Microsoft's suggestion that RICO plaintiffs will have a field day with the Ninth Circuit's decision. (*See* Pet. Cert. at 5, 18 & n.5.) As an initial matter, this Court disposed of similar concerns long ago in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985):

> Underlying the Court of Appeals' holding was its distress at the "extraordinary, if not outrageous," uses to which civil RICO has been put. Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against "respected and legitimate 'enterprises.'" Yet Congress wanted to reach both "legitimate" and "illegitimate" enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. . . .
>
> It is true that private civil actions under the statute are being brought almost solely against

---

enterprise in the Ninth Circuit – a common purpose for which the association has formed; an ongoing organization; and the functioning of the associated persons as a continuing unit – which in turn is based on a straightforward application of *United States v. Turkette*, 452 U.S. 576 (1981). (*See* Pet. Cert., App. at 18a-20a.)

> such defendants, rather than against the archetypal, intimidating mobster. Yet this defect – if defect it is – is inherent in the statute as written, and its correction must lie with Congress.

Id. at 499 (citations and footnote omitted). It is telling that in the two decades since the *Sedima* decision, Congress has added no restrictions on the types of entities that may be sued under RICO.

As discussed above, the circuit split on the separate-structure requirement has already existed for over twenty years. Microsoft offers no evidence that the circuits declining to require a separate structure have become magnet jurisdictions for civil RICO litigation. Despite its heavy complex-litigation docket, the Second Circuit did not become a mecca for RICO plaintiffs when it rejected the separate-structure requirement a quarter-century ago, *see, e.g., United States v. Mazzei*, 700 F.2d 85, 88 (2d Cir.) (rejecting defendant's argument that "to establish a violation of RICO, there must be proof that the alleged enterprise was distinct from the alleged pattern of racketeering activity"), *cert. denied*, 461 U.S. 945 (1983). There is no reason to believe the Ninth Circuit's experience will be any different. Microsoft's histrionics furnish no basis on which to grant a writ of certiorari.

B. Review Of The Ninth Circuit's Judgment Would Have Little Effect On The Proceedings Below.

In addition, this case presents a poor opportunity for the Court to clarify the ascertainable-structure issue. Even if this Court were to grant certiorari, and even if it were to hold that the Ninth Circuit erred and a separate

ascertainable structure is required for an association-in-fact enterprise, the holding would have little effect on the case after remand. Respondents will simply argue below that the Microsoft-Best Buy enterprise as currently alleged does have an ascertainable structure with an existence beyond that strictly necessary for the predicate acts – as indeed they previously did. In fact, Respondents never volunteered that an ascertainable structure should not be required, as the governing precedent at the time was *Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996), which held "a RICO enterprise must have an ascertainable structure separate and apart from the structure inherent in the conduct of the pattern of racketeering activity," *id.* at 1295. Thus, Respondents explained that the Microsoft-Best Buy joint marketing enterprise had a separate existence, because it would still have existed even if the unauthorized MSN account registrations had not occurred. *See United States v. Lemm*, 680 F.2d 1193, 1201 (8th Cir. 1982) (holding that evidence was sufficient to show separate structure required by Eighth Circuit) ("The arson ring, through hand-delivery of insurance claims, could have conducted its activities without any predicate acts of mail fraud. In other words, if we eliminate for purposes of argument the predicate acts of mail fraud, the evidence still shows an on-going structure which engaged in legitimate purchases and repairs of property as well as acts of arson."), *cert. denied*, 459 U.S. 1110 (1983); *Hastings v. Fidelity Mortgage Decisions Corp.*, 984 F. Supp. 600, 610 (N.D. Ill. 1997) (decision by district court in Third Circuit, which requires separate ascertainable structure) ("The association exists separate and apart from the pattern of racketeering activity alleged in the Complaint, since Fidelity would require the services provided by mortgage brokers such as Superior even if it did not participate in

schemes designed to artificially inflate the interest rates charged to borrowers.").

If the Ninth Circuit nevertheless disagreed with Respondents about the sufficiency of their complaint in light of this Court's hypothetical holding, Respondents would amend their complaint, as even those judges who found the complaint inadequate in the en banc opinion here believed Respondents were entitled to do. (*See* Pet. Cert., App. at 24a-27a.) At this point, there is little doubt Respondents could adequately amend their complaint with respect to the details of the enterprise. After the District Court dismissed Respondents' RICO claims with prejudice as insufficiently alleged, Respondents, at the District Court's suggestion, re-filed their state-law claims in the Washington Superior Court for King County. A substantial amount of discovery has been taken in the state-court action, and a nationwide plaintiff class has been certified. Respondents can, among other things, name individual personnel from Microsoft and Best Buy who were responsible for MSN account registrations and describe how the companies managed their marketing alliance, including citing and quoting from a document governing the joint steering committee established for that purpose.

Therefore, if for the sake of clarity, the Court wishes to decide the ascertainable-structure question in a case where the holding will be immediately outcome-determinative (assuming it has any inclination to decide the issue at all), the present case is ill-suited for that purpose.

C. At Any Rate, The Ninth Circuit's Holding Is Correctly Based On A Straightforward Application Of *Turkette*.

Similarly, if the Court wishes to decide the ascertainable-structure issue in a way that achieves maximum clarity, the goal would be better served by holding that a court of appeals erred in its view of the matter – which is not the case here. The Ninth Circuit based its holding on the plain language of *United States v. Turkette*, 452 U.S. 576 (1981), which described the characteristics of an associated-in-fact enterprise thus:

> The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise.

Id. at 583 (citation omitted). Nowhere in *Turkette* did the Court mention the need to establish any sort of separate ascertainable structure to the enterprise. A common purpose; an ongoing organization; and the functioning of the associated persons as a continuing unit – these are the elements of an association-in-fact enterprise set forth in *Turkette*. The additional separate-structure requirement imposed by several circuits finds no support in the Court's language. Microsoft contends a separate-structure requirement is necessary to distinguish an enterprise from a mere conspiracy. (*See* Pet. Cert. at 14-15.) That argument,

however, simply ignores the elements of an enterprise described in *Turkette*. If all elements are present, a RICO enterprise exists. If they are not, then one has a mere conspiracy or something else short of a RICO enterprise. As the D.C. Circuit explained in *Perholtz*, 842 F.2d 343:

> Those courts imposing a strict separateness requirement appear to be concerned that RICO could be expanded to encompass even a "sporadic and temporary criminal alliance." They need not be, however, if proper attention is given to the organization and continuity requirements for the enterprise, on the one hand, and the "continuity plus relationship" requirement for the pattern of racketeering, on the other hand.

Id. at 363 (citation omitted).[5]

In fact, a separate-structure requirement tends to thwart, rather than further, the purposes of RICO. As this Court held in *Turkette*, RICO reaches purely criminal enterprises as well as legitimate ones. *See* 452 U.S. at 578. To the extent a separate-structure element is construed to require an organization engaging in both legitimate

---

[5] Thus, contrary to Microsoft's mischaracterization, a simple conspiracy is *not* enough to constitute an enterprise in those circuits without an ascertainable-structure requirement. (*See* Pet. Cert. at 13.) The *Turkette* elements must still be established. *See, e.g.*, Pet. Cert., App. at 18a ("The Supreme Court in *Turkette* articulated the criteria for an associated-in-fact enterprise under RICO. . . . We consider these criteria in turn."); *United States v. Cianci*, 378 F.3d 71, 82 (1st Cir. 2004) ("This circuit has cast its lot with courts that have declined to make *Bledsoe*'s 'ascertainable structure' criterion a mandatory component of a district court's jury instructions explaining RICO associated-in-fact enterprises. Instead, we have approved instructions based strictly on *Turkette*'s explanation of how a criminal association might qualify as a RICO enterprise.") (citation omitted).

business activity and predicate acts of racketeering, the *Turkette* holding is flouted. Moreover, even with respect to purely criminal enterprises, it is inappropriate to require an ascertainable structure with an existence beyond that necessary to perform the predicate acts. As the Second Circuit stated in *Mazzei*, 700 F.2d 85, such a requirement "would lead to the anomalous result that a large scale underworld operation which engaged solely in trafficking of heroin would not be subject to RICO's enhanced sanctions, whereas small-time criminals jointly engaged in infrequent sales of contraband drugs and illegal handguns arguably could be prosecuted under RICO." *Id.* at 89.

Accordingly, far from erring, the Ninth Circuit followed *Turkette* and remained faithful to congressional intent by rejecting a separate-structure requirement.

II. MICROSOFT PRESENTS NO COMPELLING REASON WHY THIS COURT SHOULD REVISIT WHETHER AN ASSOCIATION-IN-FACT ENTERPRISE CAN CONSIST OF A GROUP OF CORPORATIONS.

If anything, there is even less merit to Microsoft's request for a writ of certiorari to decide whether a group of corporations can constitute an association-in-fact enterprise. (*See* Pet. Cert. at 18-22.) Contrary to Microsoft's interpretation, the Court's consideration of the issue only two terms ago in *Mohawk Industries, Inc. v. Williams*, No. 05-465 (argued April 26, 2006), is reason to deny Microsoft's petition, not grant it. In *Mohawk*, the Court reviewed a ruling of the Eleventh Circuit, reported at *Williams v. Mohawk Industries, Inc.*, 411 F.3d 1252 (11th Cir. 2005), affirming denial of a motion to dismiss RICO

claims predicated on an alleged enterprise consisting of the corporation Mohawk Industries and third-party labor recruiters. As Microsoft observes, the transcript of oral argument shows that much, if not most, of the argument was devoted to the question of whether an association-in-fact enterprise can include or consist of corporations. Furthermore, a review of the briefs on the merits shows the issue was thoroughly discussed by the parties in writing. In addition, a decision on the question in the negative would have been outcome-determinative. As petitioner's counsel Carter Phillips, Esq., observed, although the sole question on which certification had been granted was different (whether a defendant corporation and its agents engaged in arm's-length dealings can constitute an enterprise):

> We – we think it is fairly subsumed within the question presented, and we also think it would be an – an utterly artificial exercise to try to analyze what is an association-in-fact enterprise without first deciding whether or not a corporation could be included in the first instance because, as Justice Scalia says, if they can't, then it seems to me this is a substantially easier question, and also it is an extraordinarily important one.

Tr. Oral Arg. at 8-9.

Nevertheless, despite having an opportunity to decide the question on a full record, the Court declined to do so; vacated the judgment of the Eleventh Circuit; and directed the court of appeals to consider the case further in light of *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), which addresses the need to conduct a proximate-cause inquiry into alleged RICO injuries. *See Mohawk Indus. v.*

Williams, 126 S. Ct. 2016 (2006). On remand, the Eleventh Circuit reinstated its ruling affirming denial of Mohawk's motion to dismiss the RICO claims. *See Williams v. Mohawk Indus.*, 465 F.3d 1277 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 1381 (2007). Respondents submit that this Court's actions reflect an inclination to leave undisturbed the unanimous conclusion of the ten circuits that have considered the matter – that a group of corporations can constitute an association-in-fact enterprise. Microsoft's petition for a writ of certiorari adds nothing new to the extensive dialogue that was conducted in *Mohawk*, and should be denied.

That unanimous conclusion is also correct on the merits. As thoroughly discussed by the respondent and the United States as amicus curiae in *Mohawk*, 18 U.S.C. § 1961(4) says "'enterprise' *includes* any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. . . ." (Emphasis added.) The use of "includes" means the referenced list of things that can constitute an enterprise is not exhaustive. Furthermore, 18 U.S.C. § 1962(c) says:

> It shall be unlawful for any *person* employed by or *associated with* any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(Emphasis added.) Section 1962(c) speaks of "persons," not "individuals." 18 U.S.C. § 1961(3) defines "person" to "include[] any individual or entity capable of holding a legal or beneficial interest in property." Therefore, Congress

necessarily contemplated that non-natural persons, e.g., corporations, could be liable as part of an association-in-fact enterprise.

To argue, as Microsoft does, that an association-in-fact enterprise must consist exclusively of individuals and cannot include any corporation or other non-natural person is to propose a truly radical limitation of RICO. As the D.C. Circuit observed in *Perholtz*, 842 F.2d 343, in rejecting a similar argument:

> Appellants' reading of section 1961(4) would lead to the bizarre result that only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO. This interpretation hardly accords with Congress' remedial purposes: to design RICO as a weapon against the sophisticated racketeer as well as (and perhaps more than) the artless.

Id. at 353.

Microsoft concludes by renewing its policy argument that RICO must be judicially limited to protect American business. (*See* Pet. Cert. at 20-21.) This holding, however, dates back twenty years or more among the various courts of appeals. (*See* Pet. Cert. at 20-21 (collecting cases).) During that time, the American business landscape has not been devastated or even significantly affected by RICO litigation, nor has Congress seen fit to "correct" the holding through legislation. Microsoft's alarmist predictions have thus already been proven false, and are no reason to grant its petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

September 5, 2007

Respectfully submitted,

DANIEL C. GIRARD
Counsel of Record
AARON M. SHEANIN
AMANDA M. STEINER
GIRARD GIBBS LLP
601 California Street, 14th Floor
San Francisco, California 94108
Telephone: (415) 981-4800
Facsimile: (415) 981-4846

ANTHONY K. LEE
Attorney at Law
580 California Street, 16th Floor
San Francisco, California 94104
Telephone: (415) 439-4862
Facsimile: (415) 439-4962

BETH E. TERRELL
TOBY J. MARSHALL
TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
Telephone: (206) 682-5600
Facsimile: (206) 682-2992

Counsel for Respondents

08

(4)

FILED
SEP 18 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-138

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

JAMES ODOM *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

MICHAEL J. SHEPARD
HELLER EHRMAN LLP
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

CARTER G. PHILLIPS*
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

CHARLES B. CASPER
PATRICK T. RYAN
MONTGOMERY, MCCRACKEN,
WALKER & RHOADS, LLP
123 S. Broad Street
Philadelphia, PA 19109
(215) 772-1500

MICHELLE B. GOODMAN
SIDLEY AUSTIN LLP
555 West 5th Street
Los Angeles, CA 90064
(213) 896-6000

Counsel for Petitioner

* Counsel of Record

September 18, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF OF PETITIONER	1
CONCLUSION	7

TABLE OF AUTHORITIES

CASES Page

Mohawk Indus., Inc. v. *Williams*, 126 S. Ct. 2016 (2006) 5
Reves v. *Ernst & Young*, 507 U.S. 170 (1993) 2
United States v. *Masters*, 924 F.2d 1362 (7th Cir. 1991) 4, 6
United States v. *Navarro-Ordas*, 770 F.2d 959 (11th Cir. 1985) 6
United States v. *Perholtz*, 842 F.2d 343 (D.C. Cir. 1988) 6
United States v. *Thevis*, 665 F.2d 616 (5th Cir. 1982), *superseded on other grounds by rule*, Fed. R. Evid. 804(b)(6), *as recognized in United States* v. *Nelson*, No. 06-60487, 2007 WL 2116438 (5th Cir. July 24, 2007) 6
United States v. *Turkette*, 452 U.S. 576 (1981) 2

STATUTES

18 U.S.C. § 1961(4) 6
§§ 1961-1968 1
§ 1962(c) 6

REPLY BRIEF OF PETITIONER

Petitioner has demonstrated that this case presents two significant questions concerning the proper interpretation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), each of which merits this Court's review: (1) whether an association-in-fact RICO enterprise must be an organization that has an ascertainable structure separate and apart from that inherent in the alleged pattern of racketeering activity; and (2) whether a group of corporations can constitute an association-in-fact RICO enterprise. As to the first question, Respondents' Opposition only underscores the need for this Court to address and clarify the scope of the statutory "enterprise" requirement. As to the second, Respondents mistakenly claim that this Court previously decided not to disturb the widely-adopted view that association-in-fact enterprises can include corporations. Respondents' arguments are meritless, and this Court should grant certiorari.

1. The Ninth Circuit's decision in this case exacerbates a significant four-to-seven split in the courts of appeals over whether an association-in-fact RICO enterprise must have an ascertainable structure separate from that inherent in the alleged pattern of racketeering activity. The Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits hold that it must; the First, Second, Eleventh, and now Ninth Circuits disagree. Respondents do not deny that this split exists.[1] Instead, they urge the Court to allow this conflict to persist, observing that "the circuit split has already existed in one form or another for over twenty years," and speculating that

---

[1] Respondents disagree with Petitioner's view of the D.C., Sixth, and Seventh Circuits' positions on this issue. Opp. 3-4. But this only highlights the lack of clarity regarding the requirements of an association-in-fact enterprise and further underscores the need for this Court's intervention.

"it seems to have posed no undue problem for courts, litigants, or the development of the law." Opp. 4.

Respondents are flatly wrong. In the 26 years since this Court's decision in *United States* v. *Turkette*, 452 U.S. 576 (1981), the courts of appeals have struggled with the concept of an association-in-fact RICO enterprise. Yet they have failed to develop a consistent and meaningful definition of that fundamental statutory element. As the Ninth Circuit recognized, the result has been considerable uncertainty and confusion among the lower courts. Pet. App. 14a ("The Court's explanation of the meaning of an associated-in-fact enterprise in *Turkette* has not been clearly understood in the lower courts, including our own."). The conflict is mature and irreconcilable and merits this Court's attention.

Moreover, the broad interpretation of the "enterprise" element adopted by the Ninth Circuit below and espoused by the First, Second, and Eleventh Circuits has a profound effect on the scope of civil RICO liability. Section 1962(c)'s requirement that a defendant participate in the operation or management of an "enterprise" is a "critical limitation" on RICO that prevents it from becoming nothing more than a conspiracy or aiding and abetting statute. *Reves* v. *Ernst & Young*, 507 U.S. 170, 183 (1993). Yet these circuits hold that where an association-in-fact enterprise is alleged, no organization is required beyond that inherent in the commission of the alleged predicate acts. By permitting plaintiffs to plead an association-in-fact enterprise in any case in which there is coordinated activity among businesses, this ruling vastly expands RICO's reach far beyond its purpose.

As the U.S. Chamber of Commerce as *amicus curiae* observes, this unwarranted increase in potential corporate RICO liability, with its attendant stigma of "racketeering" and threat of treble damages will continue to have a significant and unintended impact on American businesses unless this Court grants certiorari and restores civil RICO to its proper role. Br. 10 ("[M]any of the *amicus* Chamber of Commerce's

members already face a constant threat of civil RICO suits. And the mere prospect of an increase of costly and potentially ruinous RICO treble-damages litigation predicated solely on collaborations like the marketing agreement at issue here will inappropriately affect corporate decisionmaking.").

Respondents' suggestion that this case does not present an appropriate opportunity to resolve this circuit split, see Opp. 6-11, is baseless. Respondents do not, and cannot, dispute that the Ninth Circuit's decision squarely presents the issue of whether an association-in-fact RICO enterprise must have an ascertainable organizational existence separate and distinct from that inherent in the alleged pattern of racketeering activity. Instead, they argue that the outcome of this case will not be affected by this Court's decision because, Respondents contend, either the Ninth Circuit's decision was correct or Respondents could further amend their complaint to plead the required separate organizational structure. *Id.*

That is no basis to deny this petition. This petition affords the Court an opportunity to settle a clear and irreconcilable conflict among the federal circuits and provide the lower courts much needed guidance as to the proper interpretation of Section 1962(c)'s "enterprise" requirement. What Respondents ignore is the ability of most plaintiffs suing large corporations to forum shop and bring their RICO actions in circuits where there is no requirement that an organization be ascertainable. That situation is intolerable, and only this Court can bring uniformity to the law.

In any event, the Ninth Circuit's holding was not, as Respondents suggest, "based on a straightforward application of *Turkette*." *Id.* at 9. That court's erroneous interpretation of the "enterprise" requirement finds no support in *Turkette* or the language and structure of the statute. Indeed, by effectively collapsing two separate elements – enterprise and pattern – into one, it rewrites the statute and alters the

statutory scheme. See *United States* v. *Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991).[2]

Properly construed, the enterprise requirement is not, and cannot be, met in this case. The enterprise alleged by Respondents consists only of the marketing agreement between Microsoft and Best Buy and their actions in furtherance of that agreement. The district court correctly held that these allegations fail to demonstrate the existence of an enterprise separate and distinct from the alleged racketeering activity. Pet. App. 34a. The district court also properly concluded that any additional allegations (such as those Respondents propose to include if they are permitted to further amend their complaint (Opp. 8)) concerning the personnel involved and the procedures under which they implemented the marketing agreement will not cure this deficiency. Pet. App. 35a. No additional allegations can change the fact that the alleged enterprise in this case is simply (and indisputably) a marketing alliance between two independent companies to promote certain of each other's products and services. This petition squarely presents the issue of whether this contractual alliance can be a RICO enterprise and asks the Court to clarify that an enterprise must be something more than, and distinct from, the persons who comprise it and the acts they allegedly commit.

In short, the Ninth Circuit's conclusion that Respondents properly alleged a RICO enterprise undeniably presents the question of whether an association-in-fact enterprise must be an organization with a separate ascertainable structure. Without correction, the court of appeals' ruling will allow plaintiffs to transform state-law consumer protection claims

---

[2] Respondents assert that a simple conspiracy would not be enough to constitute an enterprise as defined by the Ninth Circuit. Opp. 10 n.5. However, it would be a rare conspiracy, if any, that would not meet the Ninth Circuit's requirements of a group of associates acting with a common purpose and using their association as a vehicle to commit an ongoing series of predicate acts.

into federal RICO actions and to wield the threat of draconian penalties to extract unwarranted settlements.[3] The coercive force of RICO's harsh sanctions should not depend on the court in which the lawsuit is filed. It is time for this Court to resolve this conflict by granting the petition for certiorari.

2. The Ninth Circuit's decision also presents the issue of whether a group of corporations can constitute an association-in-fact RICO enterprise. This question is one of fundamental importance because it frames the first question presented and has the potential to expose virtually every business entity to RICO's treble damages for every collaborative activity with another business.

No obstacles prevent the Court's review of this significant question. Respondents nonetheless assert that the Court's consideration of this issue in *Mohawk Industries, Inc.* v. *Williams*, 126 S. Ct. 2016 (2006), and its choice not to resolve it in that case "reflect[s] an inclination to leave undisturbed the unanimous conclusion of the ten circuits that have considered the matter." Opp. 13. This Court, of course, best understands the basis for its decision, but it is at least equally plausible that the Court declined to resolve this issue in *Mohawk* because it was not raised explicitly in the petition for certiorari.

Respondents also suggest that the weight of contrary authority counsels against granting this petition. In fact, the opposite is true. As demonstrated in the petition, the courts of appeals' reasoning on this issue – to the extent it exists – is unpersuasive and does not withstand scrutiny. Some, like Respondents here (*id.*), rely on the fact that the definition of

---

[3] Respondents' Opposition is telling. Although their RICO claim is fundamentally and incurably flawed, Respondents assert that they should be permitted to amend their complaint yet again based on information they claim to have obtained in discovery on their state-law claims in their related case pending in state court, undoubtedly in the hope that a settlement can be extracted. Opp. 8.

"enterprise" is introduced by the term "includes" without conducting any analysis of whether Congress intended that term to provide an illustrative list of examples or whether Congress used that term, as it has elsewhere in the statute, to introduce a comprehensive list. See, *e.g.*, *Masters*, 924 F.2d at 1366; *United States* v. *Thevis*, 665 F.2d 616, 625 (5th Cir. 1982).[4] Others make unfounded policy arguments that Congress ought to have provided for associations in fact consisting of corporations. See, *e.g.*, *United States* v. *Perholtz*, 842 F.2d 343, 353 (D.C. Cir. 1988) (per curiam) (suggesting that construing the statute as written would "lead to the bizarre result that only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO").[5] Others provide no rationale at all. See, *e.g.*, *United States* v. *Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985).

Nonetheless, simply because this flawed view has been widely accepted by the lower courts, the issue is seldom

---

[4] Respondents' observation that a corporation is a "person" as defined in Section 1961(3) and therefore may be liable if it is "associated with any enterprise" and "conduct[s] or participates[s] ... in the conduct of such enterprise's affairs through a pattern of racketeering activity," 18 U.S.C. § 1962(c), is irrelevant. Opp. 13-14. That the statute contemplates the possibility that corporations may be part of certain types of enterprises (such as partnerships or associations) does not necessarily mean that Congress intended association-in-fact enterprises to include corporations. Congress *could* have defined an enterprise as including a group of *persons* associated in fact, but it did not. Instead, it defined enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of *individuals* associated in fact." 18 U.S.C. § 1961(4) (emphasis added).

[5] Contrary to Respondents' characterization, excluding corporations from association-in-fact enterprises is not a "truly radical limitation of RICO." Opp. 14. Nor would it lead to the "bizarre result" feared by the D.C. Circuit. Criminals could not avoid RICO simply by forming corporations. In such a situation, the individuals could be charged and each corporation also could be charged as a separate enterprise.

raised and numerous cases are permitted to proceed based on a theory that lacks support in the statute. This case presents an opportunity to correct this fundamental misinterpretation of RICO's enterprise requirement and restore it to the scope Congress intended. The Court unquestionably should decide the first question presented, and the second one provides a complementary issue that will allow the Court fully to address the scope of civil liability under RICO.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL J. SHEPARD
HELLER EHRMAN LLP
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

CARTER G. PHILLIPS*
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

CHARLES B. CASPER
PATRICK T. RYAN
MONTGOMERY, MCCRACKEN,
WALKER & RHOADS, LLP
123 S. Broad Street
Philadelphia, PA 19109
(215) 772-1500

MICHELLE B. GOODMAN
SIDLEY AUSTIN LLP
555 West 5th Street
Los Angeles, CA 90064
(213) 896-6000

Counsel for Petitioner

September 18, 2007

* Counsel of Record

65

(2)

No. 07-138

FILED
SEP 5 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner

v.

JAMES ODOM ET AL.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

BETH S. BRINKMANN
Counsel of Record
SETH M. GALANTER
BRIAN R. MATSUI
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 887-1544

Counsel for amicus curiae the Chamber of Commerce of the United States of America

September 5, 2007

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether an association-in-fact "enterprise" under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, must be an organization with an ascertainable structure separate and apart from that inherent in the alleged pattern of racketeering activity.

2. Whether a group of corporations can constitute an association-in-fact RICO enterprise.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

THIS COURT'S REVIEW IS NEEDED TO REVERSE THE RULING BELOW THAT ALLOWS A CORPORATION TO BE HELD LIABLE FOR TREBLE DAMAGES UNDER RICO FOR CONDUCTING THE AFFAIRS OF A PURPORTED "ENTERPRISE" THAT IS NOTHING MORE THAN A BUSINESS AGREEMENT BETWEEN TWO CORPORATIONS 5

A. The Court Of Appeals' Erroneous Reading Of RICO Stifles Legitimate Business Collaboration That Is Critical To Innovation And Entrepreneurship In The American Economy 5

1. The error in the ruling below makes legitimate corporate collaborations susceptible to allegations of a RICO "enterprise" 5

2. Legitimate business collaboration is vital to the nation's economy 6

3. The Ninth Circuit's ruling deters legitimate corporate collaboration 9

TABLE OF CONTENTS—Continued

Page

B. The Court Of Appeals' Ruling Is Contrary To RICO's Plain Language On Two Important Questions Concerning The Scope Of A RICO "Enterprise" And Deepens A Conflict With Other Circuits 11

1. An allegation of a "pattern of racketeering activity" does not constitute an allegation of an "enterprise" for purposes of Section 1962(c) 12

2. A group of corporations that are associated through a business agreement, but are not a separate legal entity, do not constitute a RICO "enterprise" 13

C. The Instant Case Presents An Ideal Vehicle For This Court's Review Of The Proper Scope Of RICO 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Atkinson v. Anadarko Bank & Trust Co., 808 F.2d 438 (5th Cir.), *cert. denied*, 483 U.S. 1032 (1987)..... 15

Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986 (8th Cir. 1989) 17

Clinton v. New York, 524 U.S. 417 (1998) 14

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 8

H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229 (1989)..... 18

Leocal v. Ashcroft, 543 U.S. 1 (2004) 18

Miranda v. Ponce Fed. Bank, 948 F.2d 41 (1st Cir. 1991) 10

Reves v. Ernst & Young, 507 U.S. 170 (1993).....7, 14, 18

Ruiz v. Alegria, 896 F.2d 645 (1st Cir. 1990) 10

Scheidler v. National Org. for Women, Inc., 537 U.S. 393 (2003) 18

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).....9, 10,11

TRW, Inc. v. Andrews, 534 U.S. 19 (2001) 13, 14

Texaco Inc. v. Dagher, 126 S. Ct. 1276 (2006)..... 9

United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980) 15

United States v. Bagaric, 706 F.2d 42 (2d Cir. 1983)..... 16

United States v. Bledsoe, 674 F.2d 647 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982) 12

United States v. Blinder, 10 F.3d 1468 (9th Cir. 1993) 15

TABLE OF AUTHORITIES—Continued

Page

United States v. Cagnina, 697 F.2d 915 (11th Cir.), *cert. denied*, 464 U.S. 856 (1983) 16

United States v. Huber, 603 F.2d 387 (2d Cir. 1979) ..17, 18

United States v. Johnson, 440 F.3d 832 (6th Cir.), *cert. denied*, 127 S. Ct. 48 (2006) 15

United States v. Korando, 29 F.3d 1114 (7th Cir.), *cert. denied*, 513 U.S. 993 (1994) 12

United States v. London, 66 F.3d 1227 (1st Cir. 1995) 17

United States v. Masters, 924 F.2d 1362 (7th Cir. 1991) 15

United States v. Patrick, 248 F.3d 11 (1st Cir.), *cert. denied*, 535 U.S. 910 (2001) 16

United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964) 8

United States v. Perholtz, 842 F.2d 343 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988) 15, 17

United States v. Riccobene, 709 F.2d 214 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983) 15

United States v. Rogers, 89 F.3d 1326 (7th Cir.), *cert. denied*, 519 U.S. 999 (1996) 12

United States v. Sanders, 928 F.2d 940 (10th Cir.), *cert. denied*, 502 U.S. 845 (1991) 16

United States v. Tillett, 763 F.2d 628 (4th Cir. 1985) 15

United States v. Turkette, 452 U.S. 576 (1981) 12, 13, 15

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 10

TABLE OF AUTHORITIES—Continued

Page

STATUTES

Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968

18 U.S.C. § 1961(1) 12

18 U.S.C. § 1961(3) 14

18 U.S.C. § 1961(4) ..... *passim*

18 U.S.C. § 1961(10) 17

18 U.S.C. § 1962(a) 11

18 U.S.C. § 1962(c) ..... *passim*

18 U.S.C. § 1962(d) 2

18 U.S.C. § 1964(a) 17

MISCELLANEOUS

Samuel Alito, Jr., *Racketeering Made Simple(r), in The RICO Racket* 1 (G. McDowell ed., 1989) 11

Daniel F. Austin, *Comment: A Businessperson's Perspective Concerning Joint Ventures*, 53 Case W. Res. L. Rev. 905 (2003) 8

Editors Note, *Symposium: Antitrust Scrutiny of Joint Ventures*, 66 Antitrust L.J. 641 (1998) 8

Federal Judicial Caseload Statistics, 2001-2006 10

FTC & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000) 7

Arthur R. Matthews, *et al.*, *Report of the Ad Hoc Civil RICO Task Force*, American Bar Ass'n Section of Corp. Banking & Bus. L. (1985) 11

TABLE OF AUTHORITIES—Continued

Page

Partners in Wealth: The Ins & Outs Of Collaboration, The Economist, January 21, 2006 (Survey: The Company: The New Organisation) 6

Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1138 (2001) 9

Transcript of Oral Argument, *Mohawk Indus., Inc. v. Williams*, 126 S. Ct. 2016 (2006) (No. 05-465) 16

Trendsetter Barometer, *Alliances and Acquisitions Increasingly Important for Fast-Growth Companies, PricewaterhouseCoopers finds* (May 16, 2006) 7, 8

Webster's Third New International Dictionary (1986) 14

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America respectfully submits this brief as *amicus curiae* in support of the petition for a writ of *certiorari*.[1]

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the nation's largest federation of businesses, representing an underlying membership of more than three million businesses and professional organizations of every size and in every sector and geographic region in the country. One important function of the Chamber is to represent the interests of its members by filing briefs as *amicus curiae* in cases involving issues of national concern to American business.

The Chamber recognizes the importance of consistent and disciplined application of the Racketeer Influenced and Corrupt Organizations Act (RICO) to deter and remedy wrongdoing prohibited by the statute. At the same time, it is concerned about those who have strong incentives to misuse the statute against legitimate businesses, in large part because of civil RICO's treble damages provisions.

The court of appeals' holding in this case, that plaintiffs adequately pleaded a RICO association-in-fact "enterprise" consisting of two corporations engaged in no more than a marketing agreement, threatens RICO litigation for every business collaboration in which the

---

[1] Letters from petitioners and respondents providing written consent to the filing of this brief are being filed with the Clerk of this Court along with this brief, in accordance with Rule 37.3. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part. No person or entity other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

Chamber's members engage. Such business collaborations, ranging from a single contract to more elaborate alliances, are essential for many American businesses to compete effectively, expand into new markets, make costly investments, and engage in innovation.

The court of appeals' ruling allows plaintiffs to transform run-of-the-mill civil actions into RICO actions for treble damages against businesses who engage in lawful collaborations, without any requirement that the plaintiffs plead and prove that the putative RICO "enterprise" has an ascertainable structure separate and apart from that inherent in the activity alleged to constitute racketeering. The ruling below thereby threatens to convert a statute designed to deter organized crime into a tool primarily used to extract settlements from legitimate businesses. That is so because businesses cannot afford either the risk that litigation will result in an award of treble damages or the injury to their reputation due to press or industry accounts of the pendency of a federal court action against them under the federal racketeering statute. Indeed, the Chamber submits, and the plain language of the RICO statute demonstrates, that the "enterprise" element that is required to make a RICO case under Section 1962(c) for treble damages can never be met based merely on a group of two or more corporations that do not form a separate legal entity.

Accordingly, the Chamber and its members have a strong interest in the Court correctly interpreting RICO and reversing the decision below with regard to the federal RICO claims.

SUMMARY OF ARGUMENT

The Racketeer Influenced and Corrupt Organizations Act (RICO) authorizes a treble damages award against a person who operates an "enterprise" through a pattern of racketeering, 18 U.S.C. § 1962(c), or conspires to do the same, 18 U.S.C. § 1962(d). RICO defines "enterprise" for this purpose as "any individual, partnership, corporation, association, or other legal entity, and any union or group of

individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). This case presents the questions whether a plaintiff bringing such a suit must establish an "enterprise" that is separate and apart from the conduct that constitutes the purported racketeering, itself, and whether a group of corporations may, without forming a separate legal entity, constitute an "enterprise" within the meaning of RICO.

The facts alleged describe petitioners Microsoft Corporation and Best Buy Stores, L.P., as having entered into a joint marketing contract to offer and activate trial membership of Microsoft's internet access service in Best Buy's stores. This is an unremarkable type of business collaboration that occurs in a similar manner countless times annually among businesses of all sizes and types across the country. RICO does not extend without limit to such circumstances, which are well beyond its target of stopping the corruption of legitimate businesses by organized crime.

But, according to plaintiffs, this marketing arrangement and activities in furtherance of the arrangement, alone, constitute an "enterprise" that gives rise to potential liability under 18 U.S.C. § 1962(c) for RICO treble damages and attorneys' fees. The court of appeals agreed, and held that, when pleading and proving a RICO enterprise, that enterprise need not have an ascertainable structure separate and apart from the alleged pattern of racketeering—in this case the offering and activating of the trial internet access service.

That ruling is wrong in two important respects. First, the court of appeals' ruling conflated two requirements under RICO § 1962(c)—that there be an "enterprise" and that a person, employed by or associated with the enterprise, conduct the affairs of the enterprise through a pattern of "racketeering activity." By allowing the "enterprise" requirement to be satisfied by nothing more than the alleged "racketeering activity," the Ninth Circuit transformed RICO into a general civil conspiracy action

for treble damages based on the various RICO predicate crimes.

The courts of appeals are hopelessly divided on this issue. The majority of the courts require that RICO plaintiffs prove a meaningful enterprise, with a structure beyond that of the racketeering activity. This Court should grant review and rule likewise.

Second, even if a RICO association-in-fact enterprise could somehow be formed with no structure distinct or apart from the alleged racketeering activity itself, the RICO statute is unambiguous that an association-in-fact enterprise does not extend to a group of corporations with a business agreement, but rather is limited to a "union or group of *individuals* associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). Congress used the term "individual" distinctly from the term "corporation" in RICO, and the use of "individuals" in the association-in-fact enterprise definition plainly does not include "corporations."

The court of appeals' ruling has a profoundly negative impact on American business because it unfairly penalizes corporations with the threat of private civil actions for treble damages based on everyday business agreements between corporations. This Court, the federal government, and the *amicus* United States Chamber of Commerce and its members have all repeatedly recognized that corporate collaborations are vital to this Nation's economy. Those collaborations will be severely jeopardized unless the ruling below is reviewed and reversed. Accordingly, this Court should grant *certiorari* and constrain RICO's enterprise definition to its statutory scope.

ARGUMENT

THIS COURT'S REVIEW IS NEEDED TO REVERSE THE RULING BELOW THAT ALLOWS A CORPORATION TO BE HELD LIABLE FOR TREBLE DAMAGES UNDER RICO FOR CONDUCTING THE AFFAIRS OF A PURPORTED "ENTERPRISE" THAT IS NOTHING MORE THAN A BUSINESS AGREEMENT BETWEEN TWO CORPORATIONS

A. The Court Of Appeals' Erroneous Reading Of RICO Stifles Legitimate Business Collaboration That Is Critical To Innovation And Entrepreneurship In The American Economy

The court of appeals' divided *en banc* decision deepens a rift amongst the federal courts of appeals. Contrary to the views of several other circuits, the ruling below eliminates the requirement that a RICO plaintiff plead and prove something more than a pattern of racketeering activity and it thus deters legitimate corporate collaborations by allowing them to be cast as RICO enterprises.

1. The error in the ruling below makes legitimate corporate collaborations susceptible to allegations of a RICO "enterprise"

The text and history of the RICO statute demonstrate the error in the court of appeals' ruling and make clear that Section 1962(c) requires more than mere proof of a pattern of racketeering activity. RICO provides for the unusual relief of treble damages and Congress limited that relief to certain instances, *e.g.*, under 18 U.S.C. § 1962(c) where there is a pattern of racketeering being used by an employee or associate of an "enterprise" to conduct the affairs of that enterprise (or to participate in the conduct of those affairs). Treble damages under RICO Section 1962(c) are not available in instances of mere racketeering or the many other crimes that may serve as RICO predicate offenses, ranging from fraud to murder. When

such crimes are at issue, but not as part of a pattern of racketeering that is corrupting the affairs of an enterprise, the standard criminal and civil remedies apply. It is only when a person engages in a "pattern of racketeering activity" to conduct the affairs of an "enterprise" (*i.e.*, the "organized crime" targeted by Congress) that the remedy and deterrent of treble damages is authorized. 18 U.S.C. § 1962(c).

But the ruling below wholly disregards these limits on the powerful treble-damages sword of RICO. The ruling conflated two distinct requirements under RICO Section 1962(c)—that there be an "enterprise" and that a person, employed by or associated with the enterprise, conduct the affairs of the enterprise through a pattern of "racketeering activity."

The ruling means that legitimate business collaborations face threats of RICO treble damages because, under the court of appeals' rationale, the collaboration itself can constitute a RICO enterprise and any allegation that the collaboration includes a pattern of underlying predicate offenses such as fraud can, at the same time, satisfy the requirement of racketeering activity. Thus, the ruling transforms RICO into a general civil conspiracy action for treble damages, based on any one of the many RICO predicate crimes, whenever a business collaboration is involved.

2. Legitimate business collaboration is vital to the nation's economy

Collaboration among businesses, which often consists of no more than a contract between two corporations, can create efficiencies, allow for penetration into new markets, and facilitate the sharing of complementary expertise. For example, many corporations rely on outside firms, such as accounting, investment, security, consulting, and employment companies, to provide services that allow the corporation to focus on its core competencies. *See Partners in Wealth: The Ins & Outs Of Collaboration*, The

Economist, January 21, 2006 (Survey: The Company: The New Organisation), at 16.

Both the Department of Justice and the Federal Trade Commission have expressly acknowledged that even competitors sometimes need to collaborate "[i]n order to compete in modern markets." FTC & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* 1 (2000). "Competitive forces" are driving corporate collaborations, whether by marketing agreements (at issue in the instant dispute) or more formal arrangements, so that business can "achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs." *Ibid.*[2]

Empirical evidence demonstrates that businesses view corporate alliances "as increasingly critical to their company's success." Trendsetter Barometer, *Alliances and Acquisitions Increasingly Important for Fast-Growth Companies, PricewaterhouseCoopers finds* (May 16, 2006), *available at* http://www.barometersurveys.com/production/barsurv.nsf/4d3e5784001f780185256b89007aa641/ab4251f9da6291568525716f006bfce0?OpenDocument&Highlight=2,alliance (last visited September 3, 2007). More than one-third of the 339 chief executive officers surveyed from some of the fastest growing U.S. businesses identified "licensing or co-marketing agreements" as "critical." One-quarter of those companies "were involved in an average of 5.7

---

[2] *Cf. Reves v. Ernst & Young*, 507 U.S. 170 (1993) (arrangement between an accounting firm and a farmer's cooperative business). In *Reves*, the plaintiffs alleged that the business was the enterprise and the accounting firm was liable under RICO as having "conducted or participated in the conduct of the 'enterprise's affairs,'" *Reves*, 507 U.S. at 185 (emphasis omitted), a burden they could not meet. Under the ruling below, however, plaintiffs would need to allege only that the accounting firm and the farmer's cooperative, by nature of their contractual relationship, formed an enterprise together and then it could have sued both of them as participants in that enterprise, allegedly conducting the affairs of the enterprise through racketeering.

licensing or co-marketing agreements" between 2004 to 2006. *Ibid.*[3]

Indeed, this Court also has long recognized that corporate collaborations "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984); *see also United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 169 (1964) (noting that the "economic significance" of corporate collaborations "has grown tremendously").[4] Businesses often enter into such arrangements in order to create synergies to stay

---

[3] Executives have explained the rationale for entering into corporate collaborations:

> We have gone from saying: "We have a series of products, and we are going to deliver them to whoever may choose to buy those products or services?" to a model of saying, "You are my customer, and what is it that I can do to try to own as much of your wallet and become more important to you." Then we try to do our best to come up with all those services that our client cares about. Some of the services I already provide. Some of the services I really do not have the resources to be able to provide right now. So, I am left with three options. For instance, I can choose not to ever provide those services. But if I want to fill the client's needs, I may choose to go out and buy a company that can help me be more important to the client. Or, and this is the third option, I can form some kind of an alliance with somebody. This option may end up being a joint venture.

Daniel F. Austin, *Comment: A Businessperson's Perspective Concerning Joint Ventures*, 53 Case W. Res. L. Rev. 905, 905-906 (2003).

[4] A corporate collaboration, such as the marketing agreement at issue in the instant dispute, "encompasses any collaborative undertaking by which two or more firms pool resources to pursue some objective, such as producing a common good, selling a common service, purchasing production inputs, and the like." Editors Note, *Symposium: Antitrust Scrutiny of Joint Ventures*, 66 Antitrust L.J. 641, 642 (1998). These arrangements can consist both of basic contractual relationships—such as the marketing agreement in the underlying dispute—or more formal integrations where the collaborating businesses create an entirely new economic or corporate entity. *Ibid.* The more formal arrangements are not at issue in the instant dispute.

competitive. *Texaco Inc. v. Dagher*, 126 S. Ct. 1276, 1279-1280 n.1 (2006); *see also* Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1138, 1139 (2001) ("'Going it alone' is no longer an option for many American businesses. Intensified foreign competition, increased demands for new technologies, soaring capital and research and development costs, shortened product life cycles, and more stringent demands for quality and performance have all added to the risk of doing business. Many firms simply lack the capital, labor, or technology required to compete effectively in such an environment.").

3. The Ninth Circuit's ruling deters legitimate corporate collaboration

The Ninth Circuit's ruling in the instant case raises issues of great importance to the business community akin to those that were at stake in *Texaco Inc. v. Dagher*, 126 S. Ct. 1276 (2006), where the Court held that a *per se* rule against price fixing does not apply "to an important and increasingly popular form of business organization, the joint venture," *id.* at 1279. The ruling below chills similar legitimate and beneficial economic activity by raising the specter of RICO liability, as well as its attendant stigma, treble damages and attorneys' fees, for other efficiency enhancing collaborations.[5] The concerns raised by the instant dispute go even further than *Dagher* because the type of collaboration at issue here involved no more than a simple marketing contract between two corporations. Yet, the court of appeals held that the allegations met the RICO "enterprise" requirement of Section 1962(c), which could therefore encompass almost every conceivable economic relationship between two or more businesses.

---

[5] The concerns expressed by the Court in *Dagher* are particularly relevant to the instant dispute because RICO was modeled after antitrust laws and their remedies. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 485 (1985).

These concerns are not illusory. Civil RICO is becoming one of the most frequent and damaging devices used against businesses. Since 2001, a staggering 4500 civil RICO cases have been filed, only 35 of which were brought by the government. *See Federal Judicial Caseload Statistics*, 2001-2006, Tables C-2 (U.S. District Courts-Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit), *available at* http://www.uscourts.gov/caseload statistics.html (last visited Aug. 8, 2007). These numbers plainly demonstrate what is already obvious: RICO has strayed well beyond its original intent of fighting organized crime.

Indeed, many of the *amicus* Chamber of Commerce's members already face a constant threat of civil RICO suits. And the mere prospect of an increase of costly and potentially ruinous RICO treble-damages litigation predicated solely on collaborations like the marketing agreement at issue here will inappropriately affect corporate decisionmaking. Such an increased risk of RICO litigation means that the possibility of a RICO suit will be factored into the strategic planning of legitimate corporate collaborations, a result that the drafters of the act could not have envisioned.

Moreover, as this Court has recognized, "procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment." *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 (1978). Civil RICO carries precisely such a "stigmatizing effect," because it is brought under a statute that applies to federal criminal prosecution of racketeering, *Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990), and thus has been considered "the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991); *see also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 506 (1985) (Marshall, J. dissenting) ("Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for

extortive purposes, giving rise to the very evils that it was designed to combat.") (citing Arthur R. Matthews, *et al.*, *Report of the Ad Hoc Civil RICO Task Force*, American Bar Ass'n Section of Corp. Banking & Bus. L. at 69 (1985)).

B. The Court Of Appeals' Ruling Is Contrary To RICO's Plain Language On Two Important Questions Concerning The Scope Of A RICO "Enterprise" And Deepens A Conflict With Other Circuits

As the name of the act suggests, the text of the law provides that a person violates RICO (the Racketeer Influenced and Corrupt Organizations Act) when the person criminally influences or corrupts an organization through one of the racketeering activities listed by Congress. *See* 18 U.S.C. § 1962(a) to (d). But civil RICO has expanded far outside its original intent to punish organized crime and to prevent its infiltration into our Nation's businesses. *See* Samuel Alito, Jr., *Racketeering Made Simple(r), in The RICO Racket* 1, 3-4 (G. McDowell ed., 1989) (noting that RICO has "two aims: * * * to make it unlawful for individuals to function as members of organized criminal groups [and] * * * to stop organized crime's infiltration of legitimate businesses."). This Court has expressed "doubts" about the evolution of civil RICO "into something quite different from the original conception of its enactors." *Sedima*, 473 U.S. at 500.

The ruling below further exacerbates this problem by resting on two fundamentally flawed interpretations of the statute. And the court reached this result despite the well-established, contrary interpretation of several other circuits on one of those questions regarding the distinct elements under Section 1962(c).

1. An allegation of a "pattern of racketeering activity" does not constitute an allegation of an "enterprise" for purposes of Section 1962(c)

The divided *en banc* Ninth Circuit erred when it ruled that a RICO "enterprise" need not possess any ascertainable structure that is separate and apart from the alleged pattern of "racketeering activity." This conclusion, in essence, imposes no limit on what constitutes an "enterprise" under the statute.

That was not the intent of Congress. As the concurring judges of the Ninth Circuit recognized, "RICO targets a more sophisticated crowd: those persons or entities associated in fact with 'ongoing organization'—some minimal structure, coordination, or ordering principle to distinguish them from a run-of-the-mill conspiracy." Pet. App. 25a. Several other courts of appeals have long held that view of the meaning of the statute. *See, e.g.*, *United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir.), *cert. denied*, 519 U.S. 999 (1996) ("[t]here must be some structure, to distinguish an enterprise from a mere conspiracy" (brackets in original)) (quoting *United States v. Korando*, 29 F.3d 1114, 1117 (7th Cir.), *cert. denied*, 513 U.S. 993 (1994)); *see also United States v. Bledsoe*, 674 F.2d 647, 664 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982) (same).

The ruling of those courts follows directly from this Court's reasoning in *United States v. Turkette*:

> In order to secure a conviction under RICO, the Government must prove the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C. § 1961(1) (1976 ed., Supp. III). The former is proved by evidence of an ongoing

> organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise.

452 U.S. 576, 583 (1981). That reasoning clearly distinguished, as does the statute, between RICO's "enterprise" requirement and its "pattern of racketeering requirement," so that the mere existence of a group of individuals engaged in the latter does not, by itself, satisfy the former. The Court underscored that very point in no uncertain terms by explaining that "proof" of one of these elements "does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." *Ibid.*

The *Turkette* Court's construction of 18 U.S.C. § 1962(c), unlike the decision below, is rooted in the plain language of the statute. Section 1962(c), by its express terms, requires both an "enterprise engaged in, or the activities of which affect, interstate or foreign commerce" *and* "a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). If the enterprise requirement were satisfied merely by allegations of a defendant or defendants engaging in a pattern of racketeering activity, then the enterprise requirement would be entirely superfluous to the statutory scheme, contrary to ordinary assumption that Congress intended such statutory terms to have meaning. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

2. A group of corporations that are associated through a business agreement, but are not a separate legal entity, do not constitute a RICO "enterprise"

The second error in the court of appeals' statutory construction is rooted in the fact that plaintiff's RICO claim is premised on the allegation that two businesses created an association-in-fact enterprise by entering into a

marketing agreement. The plain language of RICO does not support such an allegation.

Section 1961(4) defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The first part of the definition that relates to legal-entity enterprises lists separately any "individual" and any "corporation." The second part of the definition that relates to association-in-fact enterprises lists only "groups of individuals" and not groups of corporations.

The reference to "individuals" in the second part of Section 1961(4)'s definition cannot be interpreted to include corporations in light of the express use of those two distinct terms earlier in the same sentence to mean separate things. Had Congress intended "individual" to include a "corporation" it would not have included both terms in the definition. *TRW*, 534 U.S. at 31. And, of course, the second use of the term "individual" in Section 1961(4) should be given the same construction as the first use because Congress does not ordinarily give the identical term two different meanings in the same statute, let alone in the very same sentence. *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993).

That interpretation also is consistent with Congress's definition of "person" in RICO, which Congress defined to include "any *individual* or *entity* capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (emphasis added). Congress specifically used "individual" in the ordinary sense of the word to mean "an individual human being" and not a corporation or other legal entity, *Clinton v. New York*, 524 U.S. 417, 428 n.13 (1998) (citing Webster's Third New International Dictionary 1152 (1986)). Had Congress meant "individual[s]" to encompass "entit[ies]" such as corporations, it would not have used both terms. *TRW*, 534 U.S. at 31.

Lower courts have not necessarily grappled with these statutory interpretation arguments because they, instead, have seized upon a portion of one statement by this Court in *Turkette*, and have used it to summarily declare that "[t]here is no restriction upon the associations embraced by the definition." *United States v. Perholtz*, 842 F.2d 343, 353 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988) (quoting *Turkette*, 452 U.S. at 580); *see also United States v. Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993). But those courts, including the court below, ignored or disregarded the critical *next* phrase in the *Turkette* Court's opinion which echoes the statutory text: "an enterprise includes any union or group of individuals associated in fact." *Turkette*, 452 U.S. at 580.

The ruling below thus is premised on a flawed interpretation of Section 1961(4) that includes as RICO enterprises groups of organizations that are not legal entities, contrary to the plain statutory text, and should be reversed.

C. The Instant Case Presents An Ideal Vehicle For This Court's Review Of The Proper Scope Of RICO

As addressed in the petition for a writ of *certiorari*, the divided *en banc* court of appeals deepened a mature split of authorities in the federal courts as to whether RICO requires a meaningful enterprise, *viz.*, one with an ascertainable structure separate and apart from that which would be inherent in the alleged pattern of racketeering activity. *See* Pet. 11-18. Seven courts of appeals have held that such a structure is required. *United States v. Riccobene*, 709 F.2d 214, 223-224 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983); *United States v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985); *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5th Cir.), *cert. denied*, 483 U.S. 1032 (1987); *United States v. Johnson*, 440 F.3d 832, 840 (6th Cir.), *cert. denied*, 127 S. Ct. 48 (2006); *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991); *United States v. Anderson*, 626 F.2d 1358, 1363

(8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *United States v. Sanders*, 928 F.2d 940, 944 (10th Cir.), *cert. denied*, 502 U.S. 845 (1991). Four other courts of appeals, including the court below, have held that a separate and distinct enterprise is not required. Pet. App. 17a-18a; *United States v. Patrick*, 248 F.3d 11, 19 (1st Cir.), *cert. denied*, 535 U.S. 910 (2001); *United States v. Bagaric*, 706 F.2d 42, 56 (2d Cir. 1983); *United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir.), *cert. denied*, 464 U.S. 856 (1983). This division of authorities is plainly entrenched and irreconcilable and can be resolved only by this Court. That alone justifies this Court's plenary review.

This Court's review is also warranted on the second question presented concerning the interpretation of the "association-in-fact" enterprise definition in Section 1961(4). If a corporation cannot be a part of an association-in-fact enterprise, as the plain language of the act indicates, then a corporate collaboration that is not a separate legal entity cannot give rise to a RICO suit alleging that racketeering activity was used to conduct the purported enterprise's affairs. As the petition correctly notes, several members of this Court have expressed at least skepticism regarding the rulings of the numerous courts that have permitted such actions to go forward. Pet. 19-21 nn.6-7 (quoting Tr. Oral Arg., *Mohawk Indus., Inc. v. Williams*, 126 S. Ct. 2016 (2006) (No. 05-465), at 29 (Roberts, C.J.), 32 (Kennedy, J.), 42 (Alito, J.), 51 (Souter, J.)).

There would be no benefit in permitting this issue to percolate in the lower federal courts. The courts of appeals have already addressed the scope of 18 U.S.C. § 1961(4) on numerous occasions and have universally reached the wrong result. Although these rulings do not possess lengthy analyses, the courts of appeals have sufficiently vetted the issue by having justified their holdings for a litany of (erroneous) reasons.

For example, some courts have cited Congress's use of the term "includes" at the beginning of the "enterprise" definition ("'enterprise' includes * * * ") and have held that the list of entities that follows "is not meant to

be exhaustive," so that an informal group including corporations can constitute an association-in-fact enterprise. *See Perholtz*, 842 F.2d at 352-353; *see also United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 n.7 (8th Cir. 1989). But that construction of Section 1961(4) is inconsistent with similar uses of "includes" elsewhere in the RICO statute, where those definitions are understood to be exhaustive. *See, e.g.*, 18 U.S.C. § 1961(10) ("'Attorney General' includes the Attorney General of [the] United States * * * or any employee of the department [of Justice] or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter."). By contrast, where Congress intended in the RICO statute to be *illustrative* rather than exhaustive, it used the phrase "including, but not limited to * * * ." *See, e.g.*, 18 U.S.C. § 1964(a).

Some courts also have justified their departure from the plain language of Section 1961(4) based upon policy considerations—that if an association-in-fact enterprise did not include groups of corporations, then "only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO." *United States v. London*, 66 F.3d 1227, 1244 (1st Cir. 1995), *cert. denied*, 517 U.S. 1155 (1996) (quoting *Perholtz*, 842 F.2d at 343); *Masters*, 924 F.2d at 1366-1367. But that concern is unwarranted because holding that a RICO enterprise does not extend to a group of corporations that is not a legal entity does not immunize the corporations from suit under RICO. Once a RICO enterprise is identified (be it a legal entity or an association-in-fact entity), a RICO civil action for treble damages under Section 1962(c) can be brought against any corporation or other person who is employed by or associated with the enterprise and is conducting the affairs of the enterprise through a pattern of racketeering activity, so long as there is a separate enterprise. If there is no separate enterprise, any entity or individual engaged in racketeering is, of course, subject to other criminal prosecution and civil suit.

Some courts have construed "enterprise" in an overly broad manner by invoking the RICO clause that provides that RICO "'shall be liberally construed to effectuate its remedial purposes.'" *See, e.g.*, *Huber*, 603 F.2d at 394 (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970)). This clause, however, "is not an invitation to apply RICO to new purposes that Congress never intended," *Reves*, 507 U.S. at 183, and that construction butts up against the rule of lenity, which requires that RICO, like any statute enforced both criminally and civilly, be strictly construed with ambiguities in favor of the accused. *See Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393, 408 (2003).[6]

As such, even though lower courts have reached a universal conclusion on the second question presented, this Court's plenary review is justified on that question because the universal conclusion is wrong and there is no coherent or sustainable justification for a departure from the plain language of Section 1961(4).

---

[6] The rule of lenity applies to statutes that have both criminal and civil applications. *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004); *see also H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255 (1989) ("RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws.").

CONCLUSION

For the foregoing reasons and those set forth in the petition for a writ of *certiorari*, the petition should be granted.

Respectfully submitted,

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

BETH S. BRINKMANN
Counsel of Record
SETH M. GALANTER
BRIAN R. MATSUI
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 887-1544

Counsel for amicus curiae the Chamber of Commerce of the United States of America

September 5, 2007